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A TREATISE

ON

The Law

OF

MINES AND MINERALS.

BY

WILLIAM BAINBRIDGE, F.G.S.,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER AT LAW.

"Argenti rivus, et auri;
Æris item, et plumbi;
Tum penetrabat eos, posse hæc, liquefacta vapore,
Quam lubet in formam et faciem decurrere rerum."

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PREFACE.

GREAT BRITAIN has been celebrated for the extent and variety of its mineral productions from remote antiquity. The first events which tradition has told with respect to our country were connected with mining pursuits. Nature has, indeed, given with sparing hand the gifts of the precious metals; but she has afforded with profuse beneficence mineral substances of far greater real value and utility, the enjoyment of which is inseparably associated with the comforts and civilization of mankind, and which have largely contributed to the national pre-eminence.

The history of mining in this country would prove an entertaining and instructive study; and it would be found to present a faithful picture of the spirit and acquirements of the passing times. The progress of mining has always kept pace with the improvement of the arts, the accumulation of wealth, and the more adventurous energy of the nation. Money is not more the sinews of war than of

mining; and individual wealth not only enables the adventurer to enter upon an enlarged field of costly speculation, but its existence creates the demand for those higher wants of mankind which stimulates his uncertain pursuits. It should excite grateful reflections in the mind of a practical miner, when he contrasts the gigantic efforts and results of modern times with those earlier and puny pursuits still visible in the local codes of Derbyshire and Cornwall.

The continued and increasing ardour with which mining operations are carried on in this country, the magnitude of the capital embarked in them, and the general importance of the subject, have not failed to produce an abundant harvest of litigation, the costs of which, indeed, have in some late instances almost rivalled the prolific subjects of dispute.

It may justly excite surprise that, before the first publication of this Work, there should have been no attempt to examine and discuss the important and interesting questions which have arisen on the subject of Mines, and to reduce them to the form of a regular treatise. The subject had, indeed, received so little attention, that there hardly existed any epitome of the law respecting it in the general and elaborate books of legal reference; yet there was no country which more demanded this research. In other countries, the prerogative of the State had

asserted the general right to the Mines, and the ruling power was thus enabled to propound useful and comprehensive codes of law for their development and pursuit, not only with reference to the lands in which the minerals were found, but also to the rights exacted from neighbouring proprietors. In this country the right of the Crown was limited to mines of gold and silver. Several local customs had indeed established some extensive privileges in favour of miners, and appear to sanction some larger original royal rights. But in modern times the mines of the realm have belonged to private owners, whose powers, however absolute in other respects, have been strictly confined within their own domain. This right of proprietorship, subject to all the abstruse and complicated laws of devolution and enjoyment incident to real property, and the great division of lands among numerous owners, have produced many corresponding impediments to the prosecution of mining, and have brought the miner into constant collision with the recognized rights of others. It is, therefore, not to be wondered that the searches of the author should have sometimes resembled, both in their character and result, the occupations of which he designed to treat, and that, like the miner, he was compelled to traverse the labyrinths of darkness before emerging to the light of day. It might be expected that a subject, which has experienced in actual practice a rapid and comparatively recent extension, should not stand settled

by express decision with respect to many important topics. The strict conclusion of law, therefore, must often be arrived at, after a process not only of research but of reflection. The principle of decision must, like the mineral, not only be extracted from obscurity, but it must be carefully separated from all extraneous dross, and be produced in a pure condition, before it can be properly applied to the purposes of its attainment. An author may often still complain, with the adventurer, that the substance does not repay the cost of production, and that he must be guided by the general principles of law, or the dim light of analogy. In such cases, the author has endeavoured to elicit the true law, as well from the stores of past experience as from a more improved jurisprudence; and he has not hesitated to discuss freely the dicta and decisions of Judges, many of which have been made in times when mining questions, as has been confessed by later Judges, were only imperfectly understood.

It might be thought desirable to have presented the reader with a concise account of the laws relating to foreign mines. These laws are so numerous and so various, so replete with minute details, and often so much subject to legislative changes, that any attempt to give definite information concerning them within any reasonable limits would be imperfect, and would confer little benefit. Great facilities

exist in almost all foreign states for the promotion of mining enterprise not only by their own citizens but by strangers. When a mining concession or grant is contemplated or has been procured in any particular state, it will not be difficult for the mine owners to acquire a sufficient practical knowledge of their rights and liabilities from the special mining code, or from the official regulations.

Some alarm has lately been expressed concerning the probable exhaustion of the British coal fields. In considering the vast importance of these mines to the continuance of the national industry and prosperity, it is certainly surprising that no adequate means have been taken for ascertaining with due precision the probable extent of the strata of coal, with their relative merits and capabilities—nor for checking the waste in its consumption. The losses which are yearly suffered by owners of *all* kinds of mines by premature exhaustion, by fraud and negligence, and by misapplied adventure—arising from the want of regular mining records, which are carefully kept in almost every other country—were described by the author in an article in the *Edinburgh Review* for 1850. A bill was also prepared by him, intituled, "A Bill for establishing District Registers of all Mines and Mining Operations in England and Wales," which was read a first time in the House of Commons in August, 1844, and was printed. The indifference of the

Government and the mistaken hostility of many of the mine owners prevented any further progress; and the evils have increased by the mere lapse of time. As the public attention has now been awakened, it is hoped that some provision may be made for securing the proper enjoyment of resources which cannot be renewed like the harvests of the surface.

NEWCASTLE-UPON-TYNE,
July, 1867.

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THE LAW

OF

MINES AND MINERALS.

CHAPTER I.

THE DEFINITION OF MINERALS, AND THE MANNER OF ACQUIRING THEM.

THE subject matters of the following pages are the mineral productions of the earth.

A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of, and incapable of, supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metallic ores (*a*). In deeds and other documents the term may be explained in its larger or restricted sense, according to the intention, express or implied (*b*).

(*a*) Earl of Rosse *v.* Wainman, 14 M. & W. 859; 2 Exch. 800; 15 L. J., Exch. 67; Micklethwait *v.* Winter, 6 Exch. Rep. 644; 20 L. J., Exch. 313.

(*b*) Davvell *v.* Roper, 3 Drew. 294; 24 L. J., Chanc. 779; Bell *v.* Wilson, 2 Dr. & Sm. 395; 34 L. J., Chanc. 572; 35 Ibid. 337. See also Brown *v.* Chadwick, 7 Ir. C. L. 101; Listowel *v.* Gibbons, 9 Ibid. 223.

These various productions are differently found: in small nests, bunches, or isolated deposits; in large irregular masses; in detached fragments; in alluvial and fluvial streams; in lodes or veins; and in a regular course of stratification.

A mineral *lode* or *vein* is a flattened mass of metallic or earthy matter differing materially in its nature from the rocks or strata in which it occurs. Its breadth varies from a few inches to several feet, and it extends in length to a considerable distance, but often with great irregularity of course. It is usually perpendicular, or nearly so, in its position, and descends, in most cases, to an unknown depth.—Sometimes the sides are parallel, and sometimes they recede from each other, so as to form large accumulations, or, as they are called, bellies of mineral matter, and occasionally they approach each other so as almost, if not wholly, to cause the vein to disappear. Veins also traverse each other, and smaller ones ramify or spring out from the larger.

Ore is a term applied to certain minerals in their natural condition.

There are two common modes of working for minerals—*quarrying* and *mining*; and this distinction will be afterwards shown to be of some importance.

A quarry is an open excavation where the works are visible at the surface. The word is supposed to be derived from *quadratarius*, a stone-cutter or squarer (*c*). A mine is formed by the penetration of the surface, without exposure of the works to the light of day, by means of pits, shafts, levels or tunnels. This word is said to be derived from *minare*, signifying *ducere* to lead or draw, with reference to subterranean passages (*d*). This distinction does not, of course, depend upon the nature of the material, but simply upon the mode of working (*e*). Regard must

(*c*) Encyclop. Metrop.
(*d*) Ibid.
(*e*) Rex *v.* Sedgeley, 2 Barn. & Ad. 65; Rex *v.* Dunsford, 4 N. & M. 349; 1 Har. & Woll. 93.

be had entirely to the mode in which the article is obtained, and not to chemical or geological character (*f*).

It is inaccurate to say that a mine is unopened. The mine is not the substance, it is only the mode of getting the substance. A vein or a stratum may be unopened, but there can be no mine if there is no opening (*g*). This expression will, however, be used in its familiar signification, and the word *mine* will often be taken as synonymous with the mineral substances. Definite meanings have been given to certain mining terms by statutes relating to the Duchy of Cornwall, and to the mining customs of Derbyshire (*h*).

All minerals which are unworked and unsevered are parts of the freehold, and, as such, constitute landed property or real estate. In this condition, they will be subject to the general rules which govern the enjoyment of real property. When severed from the freehold, they become mere personal chattels.

(*f*) Rex *v.* Brettell, 3 Barn. & Ad. 424. See Chap. XI.

(*g*) Astry *v.* Ballard, 2 Mod. 193; Co. Litt. 54 b.

(*h*) See Chap. XVI.

CHAPTER II.

THE RIGHT OF PROPERTY IN MINERALS.

I. *In Freehold Lands. Sea-shore. Highways.*
II. *In Copyhold and Customary Lands.*
III. *In Common and Inclosed Lands.*
IV. *Custom and Prescription.*
V. *Manors and reputed Manors.*

Section I.

IN FREEHOLDS.

Primâ facie, the owner of freehold lands is entitled to all the minerals on and underneath the surface (*a*), with the exception of royal mines. Whatever is in a direct line between the surface of any land and the centre of the earth belongs to the owner of the surface (*b*).

This is, however, only a presumption of law, and capable of being rebutted by the production of a title distinct from that to the surface; for the mines may form a distinct possession and different inheritances (*c*). It is a common occurrence, in mining districts, for the ownership of the soil to be vested in one person and that of the mines in another. There are frequently even distinct ownerships, though generally for limited periods only, in different descriptions of mineral, and in different deposits or strata of the same kind of mineral. Thus, one person may be entitled to the iron, and another to the limestone; one seam or stratum of coal, in the same lands, may belong to

(*a*) Co. Litt. 4 b; Curtis *v.* Daniel, 10 East, 273; Barnes *v.* Mawson, 1 Maul. & Sel. 84.

(*b*) 2 Bl. Com. 18.

(*c*) Cullen *v.* Rich, Bull. N. P. 102; 2 Str. 1142; nom. Rich *v.* Johnson.

a third person, and another distinct seam to a fourth owner. In all freehold lands an adverse claim to the mineral must be distinctly established against the owner of the surface. This may be effected by the production of documents showing that the minerals have been conveyed, excepted or reserved, so as to have become vested in the claimant. In the absence of documentary evidence, or in opposition to such evidence, a title to them may be made out by proof of acts of ownership and length of possession (*d*). Thus, in an action of trover for copper ore raised under the land of the plaintiff, it was held that his apparent right to the minerals might be defeated by proof of his non-enjoyment of them, and of their being worked and used by other persons (*e*). On the other hand, the owner of the surface may in like manner acquire an indefeasible interest in the minerals under his property against those entitled to them. Such a possession must, under the recent Statute of Limitations, have endured for the space of twenty years, and in case of successive disabilities for forty years, from the time when a right of action accrued (*f*).

But such a right, being a claim to land itself, and therefore an incorporeal hereditament, cannot be acquired by prescription, which, contrary to the Roman law from which it is derived, can only confer an incorporeal privilege over the lands of others (*g*). Prescription, like custom, can only give the right to work mines.

In the absence of documentary evidence, reputation of ownership is not alone sufficient to repel the presumption of law, which favours the owner of the surface. It must, in that case, be accompanied with a uniform usage and

(*d*) Barnes *v.* Mawson, supra.

(*e*) Rowe *v.* Grenfell, Ryan & M. 396, per Lord Tenterden; Halcomb's Rep. 1.

(*f*) See 3 & 4 Will. 4, c. 27.

(*g*) Wilkinson *v.* Proud, 11 M. & W. 33; 12 L. J., N. S., Exch. 227; Bract. lib. 2, c. 22. See infra, Sect. 4.

exercise of the right, which must not rest on loose and vague evidence, but on clear and indisputable facts (*h*).

These acts of ownership must be distinct from those over the surface, in order to give the freehold. In one case, the defendant claimed the soil and freehold of the land as lord of the manor, and proved different acts of enjoyment by sporting without interruption on the lands in question, and also by taking estrays, and forbidding the burning of gorse. It was held that these acts were not properly referable to a right of soil (*i*).

It does not, however, follow that acts of ownership must be exercised in the identical lands, if these lands can be brought within the operation of a custom which prevails over an ascertained district. In a case just cited (*k*) the owner of the surface brought an action for coals which had been raised under his freehold estate, the title to which estate was deduced by a series of conveyances from the year 1655. The first of those deeds excepted a quit-rent, a nominal sum for tithes, and the services to the lord. The defendant claimed under the lords of the manor, who, as he contended, were entitled to all the coals within a certain district of the manor called the *new land*, which was described as land formerly taken in and inclosed from the commons of the manor, and was distinguished from another district in the manor called the *old land*, within which latter the defendant admitted that the freeholders, and not the lord, were entitled to the coals. It was proved that the land in question was within the district of the *new land*, being situate within an ascertained boundary, surrounded by other farms of the same description, and always so called by persons acquainted with the boundaries; and that acts of ownership had been exercised by the lords of the manor and their lessees over the coals

(*h*) Barnes *v.* Mawson, 1 Maul. & Sel. 77.

(*i*) Tyrwhitt *v.* Wynne, 2 Barn. & Ald. 554. See Cullen *v.* Rich, and Curtis *v.* Daniel, supra.

(*k*) Barnes *v.* Mawson, supra.

lying within the *new land;* and evidence was also received as to the reputation within the manor, that the right to the coals within all the *new land* belonged to the lord, but not to the coals under the *old land.* It was also proved that the lessees of the lord were in the habit of driving indiscriminately for coals in the *new land,* but that no coal had been got from the identical land in question before the time when the present action arose. Lord Ellenborough, after stating that the only evidence on the part of the plaintiff was the presumption of law arising from his being the freehold tenant of the land, observed, that the only material observation in the defendant's case was, that there did not appear to be any documents to show how or when the right or reservation claimed by the lord commenced; but that such right as to the *new land* did exist, stood not only on evidence of one or two instances of its exercise, but that all the evidence proved that there had been a uniform exercise and enjoyment of it as far back as living memory would reach. There was not a scintilla of proof on the other side that it was ever interrupted. The evidence of reputation had been applied, as it always was applied in such cases, namely, as to the limits of the *new land,* and the general right of the lord over it. Indeed the general right of the lord over the *new land* had not been questioned; it had only been contended that there was no proof of any exercise of it within the particular land in question; but it might be observed, that this was not a right, like some others, of a nature which made it likely to be exercised on the same spot at repeated intervals of time, but when once acted upon was more likely to be confined to the same spot until the subject matter was exhausted. If it had been before exercised on the lands in dispute, there could have been no question; but the evidence of the general indiscriminate exercise of it over the *new land* applied by showing that every part of the *new land* laid within the general ambit of the lord's right. The presumption in favour of the

plaintiff's title was strong until encountered by evidence, but it had been encountered in the strongest manner. The lord's right was evidenced by showing that the same right was exercised by him over lands similarly circumstanced.

But the lands must be clearly comprised within the boundaries of the district. In the case of Tyrwhitt *v.* Wynne (*l*), several leases of minerals in other parts of the manor had been proposed to be read in evidence. The evidence was rejected at the trial, and, on a motion for a new trial, Bayley, J., observed, that when once it has been established that the locus in quo is part of one entire *district*, honour or manor, it is competent to give in evidence acts done on other parts of that district, honour or manor, in order to show a right to the locus in quo. But that preliminary proof had not been given.

By stat. 39 Geo. 3, c. 21, s. 12, no mines in lands of the church sold for redemption of the land tax can be alienated, and any exception of mines in the conveyance will be void.

When the right to the minerals is vested, as a distinct possession, in a person not entitled to the surface, and there has been no ostensible possession or establishment of title to them by acts of ownership on the part of any other persons, the right of possession will still be held to continue in the original owner, and there will arise no presumption of waiver or grant in favour of the owner of the surface.

An objection was taken to a title upon the ground that, by a conveyance dated in 1704, the mines and veins of salt in the lands had been reserved to a former owner. No notice was taken of this reservation in a deed of 1761. Compensation was claimed; but it was insisted that the salt works having been levelled and discontinued, a strong presumption arose that the right had been released or abandoned. Sir William Grant, M. R., denied the exist-

(*l*) 2 Barn. & Ald. 554.

ence of any such presumption, and observed that no adverse possession was alleged, the owner of the soil had had the enjoyment to which he was entitled, and which was perfectly consistent with the right of the owner of the mines. If it could be shown that he had wrought any mines himself, or had interrupted the other parties claiming under the reservation in working them, that would lay a ground upon which the presumption could stand. But nothing was alleged, except the mere absence of any evidence of the exercise of this reserved right, for he did not see how the circumstance, that in the conveyance of 1761 no notice was taken of this reservation, could weigh against the persons who represented the former owner, if they should think proper to assert their right. There were many cases, where from non-user of a right the inference of abandonment might fairly be made; but that did not apply to such a case as this. It was not so generally true that the owner of mines worked every mine which he had a right to work, and therefore the relinquishment of the right cannot be presumed from the non-exercise of it. It was well known that mines remained unwrought for generations; that they were frequently purchased or reserved, not only without any view to immediate working, but for the express purpose of keeping them unwrought, until other mines should be exhausted, which might not be for a long period of time. It was impossible, therefore, to infer that the right was extinguished, though there was no evidence of the exercise of it since the year 1704 (*m*).

In like manner, the Statute of Limitations (3 & 4 Will. 4, c. 27) does not apply to the mere want of possession of mines by the real owner, but to the adverse possession of another. Thus, in 1725, the owner of the

(*m*) Seaman *v.* Vaudrey, 16 Ves. 390. See M'Donnell *v.* M'Kinty, 10 Irish Rep., L. R. 525; Tottenham *v.* Byrne, 12 Ir. C. L. Rep. 376.

whole estate severed the minerals from the surface. The mines had not been worked for more than forty years, and no entry had been made by any person. It was held, without hesitation, by the Court of Exchequer, that the title of the grantees of the mines was not barred by absence of possession (*n*).

The owner of the freehold, including the mines, does not lose his right to the mines by the grant of an ordinary lease of the land during the term. But if they are not excepted, he will only retain the barren right of property in them, and the lessee will acquire the equally barren right of possession, except with respect to open mines and quarries (*o*).

By the law of Scotland the mines, both opened and unopened, are presumed to be excepted in all agricultural leases, with powers to work and to make roads, on payment of surface damage, unless expressly negatived by stipulation (*p*).

The minerals found on and under the sea shore belong to the crown, or to the lord of the manor, in the absence of other established ownership. The sea shore may be claimed as part of a manor by the usual proof of acts of proprietorship, as the appropriation of wrecks and royal fish. It may also be held by prescription and in gross, but it is usually parcel of the manor. The sea shore has been defined to extend, not between the highest mark of the spring tides and low-water mark, but between the ordinary high and low-water marks. The other space between the ordinary high-water mark and the highest mark of the spring tides belongs to the owner of the adjoining tenement (*q*).

(*n*) Smith *v.* Lloyd, 9 Exch. 562; 23 L. J., N. S., Exch. 194.

(*o*) See Chap. IV., and Keyse *v.* Powell, 2 Ell. & B. 132.

(*p*) 2 Stair, 9, 31; 2 Ersk. 6, 22; Bell's Pr. 1226; Morison's Dict. 15, 253 and 267.

(*q*) Lowe *v.* Govett, 3 Barn. & Ad. 863.

The expression "ordinary high-water mark" has been further defined in the recent cases of Attorney-General *v.* Chambers, and Attorney-General *v.* Rees (*r*), in which an information was filed against the defendants for working coal under the sea shore near Llanelly, in South Wales. It was held by Lord Cranworth, L. C., on the advice of Barons Alderson and Maule, that the average of the medium tides in each quarter of a lunar revolution during the whole year gives the limit, in the absence of usage, to the rights of the crown on the sea shore. The limit of the shore reached by these tides is more frequently reached by the tide than left uncovered by it. For about three days it is exceeded, and for about three days it is left short in each week, and in one day it is reached. Thus, the tides come to that point, or beyond it, for most parts of the year. This average includes the ordinary equinoctial tides, but it excludes all extraordinary inundations.

The same rule will apply for defining low-water mark, in cases where that process becomes necessary.

The right of a lord of a manor or other claimant of the sea shore under the crown extends only to the low-water mark, where a greater power than that of Canute seems to stay further enterprise. Yet it is well known that mines have been worked under the bed of the ocean. In one instance a shaft was actually put down to work a copper mine in the midst of the waves. Occasional leases of coal under the bed of the sea are made by the crown, and it may sometimes be important to inquire into the right of proprietorship. The sovereign right of the British crown to the "four seas" is not defined with accuracy in area, and is open to much dispute. In those places where it substantially exists, the crown has by common right the ownership of the sea and the soil under it; and it would thus be entitled to the mines under these parts of the

(*r*) 2 Eq. Rep. 1195; 23 L. J., C. C. 662.

ocean (*s*). Yet even here prescription might establish a right in a private subject (*t*).

Land gradually and imperceptibly added to the adjoining demesne lands of a manor, by alluvial matter cast up from the ebb and flow of the tides, belongs to the lord, and not to the crown; on the contrary, land suddenly left by the retirement of the sea, in the absence of custom, belongs to the crown (*u*).

In a case relating to the foreshore of the estuary of the river Dee, it appeared that the crown, as lord of the manor of Englefield, in the county of Flint, was entitled to the land lying between high and low-water marks called "White Sands," as parcel of the manor, and to the coal underneath. By letters patent, in the 12th year of Charles I., the crown had made a grant of coal within the commons, waste grounds, or marshes of the manor, with full powers to work. It was declared, that the grant should be construed strictly against the crown, and most strictly and beneficially for the grantees. An information at the suit of the Attorney-General, claiming the right of the crown to the coal within the "White Sands," was dismissed with costs. It was held, that the coal had passed to the grantees under the word "waste"; that the grant was not that of a prerogative right; and that adequate words had been used for dealing with the wastes of a manor; that, in the absence of any exception to the contrary, it was the clear intention of the crown to grant the coal under the foreshore, and that, if there had been any doubt as to the true construction of the grant, it ought to be interpreted in favour of the grantees, in conformity with the express provision to that effect (*v*).

(*s*) 1 Inst. 261 a, note 205; Selden's Mare Clausum.

(*t*) Hale de Jure Maris, 11.

(*u*) The King *v.* Lord Yarborough, 3 Barn. & C. 91; 4 Dow. & R. 790; 5 Bing. 163.

(*v*) The Attorney-Gen. *v.* Hanmer, 4 De Gex & J. 205; 27 L. J., Chanc. 837.

An act, 21 & 22 Vict. c. 109, has been passed for declaring and defining the respective rights of the crown and the duchy of Cornwall to the mines and minerals in or under land lying below high-water mark, within and adjacent to the county of Cornwall.

By this act, all mines and minerals lying under the sea shore between high and low-water marks within the county, and under estuaries, tidal-rivers, and other places (below high-water mark), even below low-water mark, being in and part of the county, are vested in the duke of Cornwall, as part of the soil and territorial possessions of the duchy. But this enactment is not to extend to the mines and minerals in or under land below high-water mark which is part and parcel of any manor belonging to the crown. All mines and minerals lying below low-water mark under the open sea, adjacent to, but not being part of, the county, are vested in the crown, with power to take or use, or to pass through, over or under any lands for the time being of the duchy within the county, either in the occupation of tenants under leases or agreements made subsequently to the date of the act, or in the occupation of the duke of Cornwall for the time being, for all the usual mining purposes, on giving two months' previous notice, and making compensation to the duke and to all persons interested. No works are to be made within fifty feet of any dwelling-house, or upon any garden or orchard, or so as to interfere with any mining works of the duke, his lessees or tenants: sufficient gates and fences are to be maintained. The compensation to the duke for all or any such facilities in or over any lands of the duchy lying between high-water mark and low-water mark is to consist of a sum equal to one-fifteenth part of the net dues or monies to be received by the crown from the mines and minerals so worked; and in or over any other lands, it is to be settled by arbitration, if not determined by agreement. This compensation is in addition to that claimed for actual damages, which are to be settled in the same way. The

crown is not to be liable for damages done by its lessees. Any differences arising as to the true line of high-water mark or of low-water mark are to be settled by arbitration. Lands added to the county or taken from it under 7 & 8 Vict. c. 61, are not included in the county as defined by the act. There is the usual saving clause for rights of other persons.

As the freehold of the highway is in him that has the freehold of the soil, with free passage for all people (*w*), the minerals will also belong to the owner, subject to the public rights (*x*). In trust roads the soil does not vest in the trustees without special enactment (*y*).

By the General Turnpike Act, 7 & 8 Geo. 4, c. 24, s. 18, all minerals are reserved for the owners of the land, with powers to work them, so that no damage be done to the road.

In the act for widening highways, 5 & 6 Will. 4, c. 50, there is a reservation of minerals for the owners of the land, without power to break the surface.

The right to minerals under railways, canals and waterworks is discussed in a subsequent chapter (*z*).

Section II.

IN COPYHOLD AND CUSTOMARY LANDS.

It is now clearly established that, in the absence of special custom, the right of *property* in minerals, in copyhold and customary lands, is vested in the lord, and the right of *possession* is vested in the tenant, and, consequently, in such cases neither the lord nor the tenant can exercise any right to work them without mutual consent.

It certainly appears to be a singular feature in the con-

(*w*) 2 Inst. 705.

(*x*) Goodtitle *v.* Alker, 1 Burr. 143; 1 Roll. Ab. 392.

(*y*) Davison *v.* Gill, 1 East, 69; Rex *v.* Mersey Navigation, 9 B. & C. 95; Rex *v.* Thomas, Ibid. 114; Harrison *v.* Parker, 6 East, 154.

(*z*) Chap. XI.

dition of lands of pure copyhold tenure that, though the copyholder was formerly a mere tenant at will, as he is mostly still so described, and might have been ejected without notice or recompense, and whose whole estate of the present day has been acquired, by a series of encroachments upon the right of the lord, the latter should now be unable to enter upon the lands, merely for the purpose of taking possession of his acknowledged property, without being liable to an action of trespass. But the copyholder has now acquired an estate of inheritance in his lands, which, though still betraying, in many instances, the vestiges of his former interest, is attended with an indefeasible right of possession, not only to the surface, but to all underneath the surface. Every grant, whether express or presumed, is taken most strongly against the grantor; and, as the grantor has not expressly excepted the mines, he cannot be allowed to defeat or detract from his own grant by resuming any part of that possession which has wholly passed from him. As a mere tenant at will, the possession of the tenant extended over the whole property. This possession has not been abridged by a subsequent enlargement of his estate. The mines do not form a distinct possession, but are part of the unsevered inheritance of the whole property. For if the copyholder, contrary to the custom, worked the mines, he would, under the old law, have been liable, not to an action of trespass, but of waste (*a*).

It is stated by a learned writer on copyholds (*b*), that this doctrine was established, with respect to mines, about a century ago, by the case of the Bishop of Winchester *v.* Knight (*c*). The law on this subject, however, has never been disputed, except on the authority of a dictum in the case of Rutland *v.* Greene. But it was not till the case of Bourne *v.* Taylor was brought before the Court of

(*a*) Bourne *v.* Taylor, 10 East, 189.

(*b*) Scriven on Copyholds, p. 509.

(*c*) See infra.

King's Bench, that the subject received a complete investigation.

In the case of Rutland *v.* Greene (*d*), the precise question was not before the court, but the circumstances were these:—A mine was opened by a parson upon his glebe, and the patron moved for a prohibition to restrain him under the equity of the statute 35 Edw. 1, s. 2. The prohibition was not granted, because, it was said, otherwise none of the mines under glebe lands throughout England would be opened. Siderfin adds, "the same law seems of a copyholder of inheritance. Quære bien." It would appear from the query of Siderfin, and the account of Keble, that this point was discussed by the court, although Levinz says nothing about it in his report. Keble says, Twisden, C. J., conceived the lord may open a mine in a copyhold of inheritance. Foster, J., held it a trespass, and Keeling, J., conceived he could not do it. Thus, then, were the dicta of two judges against the dictum of one, in favour of the opinion that the lord's rights were not thought necessarily to extend to the opening of a new mine in the land of the copyholder.

In another case, the lord granted all coal mines within the manor for ninety-nine years to Dimery, who underlet to Player. Dimery's term was afterwards surrendered to the lord, but Player's interest was not extinguished; the lord opened new pits upon the copyhold, and took away the coal, upon which Player brought trover against him. It was held by the court, that the action was maintainable, but that neither the lessee nor the lessor can enter upon the copyholder to dig the coals, for the copyholder shall have trespass for breaking his close, and digging his coals (*e*).

Lord Chief Baron Gilbert, in his treatise on Tenures, says (*f*), "It seems to me that a copyholder of inheritance

(*d*) 1 Keb. 557; 1 Sid. 152; 1 Lev. 107.

(*e*) Player *v.* Roberts, W. Jones, 243.

(*f*) Gilb. Ten. 327.

cannot, without a special custom, dig for mines, neither can the lord dig in the copyholder's lands, for the great prejudice he would do to the copyhold estate; and the copyholder himself seems to have no interest in the inheritance of the lands."

In the case of the Bishop of Winchester *v.* Knight (*g*), a bill in equity was brought for an account of ore obtained from a copper mine in the land of the copyhold tenant of the bishop. It was contended that, as the tenants had used to cut down and sell timber, and also dug stone and sold it, they were entitled to the mines. But the Lord Chancellor Cowper said, that though the tenant might do one sort of waste, as to cut down and dispose of the timber, that might be by special grant, and was no evidence that the tenant had a power to commit any other kind of waste, viz., waste of a different species, as that of disposing of minerals. But that question being doubtful, and at law, he directed the bishop to bring an action of trover. This action was afterwards tried, and there never having been any mine of copper before discovered in the manor, the jury could not find that the customary tenant might, by custom, dig and open new copper mines. Upon the production of the *postea*, the Chancellor held, that neither the tenant without the license of the lord, nor the lord without the consent of the tenant, could dig in these copper mines, being new mines (*h*). It may be observed that this opinion, with respect to the right of the lord, was extrajudicial. The question in dispute was, to whom the ore already raised belonged. The tenant having failed to establish a custom in his favour to work the mines, the produce, undoubtedly, belonged to the lord, as property severed from the freehold, and without reference to the general question of his right to enter and work.

(*g*) P. Wms. 406.

(*h*) See also Townley *v.* Gibson, 2 T. R. 704, per Lord Kenyon; Whitechurch *v.* Holworthy, 19 Ves. 214; 4 Maul. & Sel. 340.

At length occurred the case of Bourne *v.* Taylor (*i*), in which the whole doctrine was, for the first time, fairly discussed, and the general principle of law was fully acknowledged. An injunction had been granted by Lord Erskine in 1806, with an understanding that the parties should decide the case at law (*j*). Accordingly, an action of trespass was brought for entering the lands of the plaintiff, situate in the township of Backworth, in the county of Northumberland, and digging for minerals. The defendant pleaded the general issue, and that the alleged trespass was committed by servants of the Duke of Northumberland, who was lord of the manor of Tynemouth, within which the lands were situate, and who claimed the minerals in the copyhold tenements in that manor. The case came before the Court of King's Bench on demurrer; and after a very able argument on behalf of the lord of the manor by Mr. (afterwards Baron) Hullock, Lord Ellenborough, C. J., delivered the judgment of the court, and, after a review of the cases, observed, that, valuable as was the supposed right, there was not a single instance shown in which any lord had ventured to act upon it. The injury to the tenant would naturally have produced resistance on his part—a suit would have been the consequence, and the result of such suit must have been known in Westminster Hall, and, as none such was known, it might fairly be presumed that a litigation of that kind had not taken place. The court was of opinion that, in the absence of custom, the lord had no such right.

A motion was sometime afterwards made to dissolve the injunction. Lord Eldon referred to the case at law, which, he said, decided nothing as to the right put in issue before him, [viz., whether the lord had, by custom, a general authority to work the mines,] but which showed that the lord of the manor may be in the same situation with respect

(*i*) 10 East, 189.

(*j*) Grey *v.* The Duke of Northumberland, 13 Ves. 236.

to mines as with respect to trees—that is, the property may be in him, but it did not follow that he could enter and take it without consent, and refused to dissolve the injunction till the right was tried at law, unless means for procuring a speedy trial could not be insured (*k*).

The action was afterwards tried, and the lord of the manor was unable to establish a custom to enter and work the mines in these copyhold lands.

This right of possession thus vested in the tenant being capable of defence against the acts of the lord, it will, of course, follow, that an action of trespass is also maintainable against a stranger for working the mines of the lord.

This was decided in a case where an action of trespass was brought by a copyhold tenant of the manor of Abercarne, in the county of Monmouth. It was contended, that a copyhold tenant could not maintain an action for a trespass to the subsoil, he being in possession of the surface only, and the mines and trees being in the lord. But it was observed by Lord Tenterden, that the general rule being that he who has the surface has the subsoil, it seemed to him that the copyholder had possession of the subsoil, though he might have no property in it. The authorities which show that a lessee at will may take a release of the inheritance whereby his estate is enlarged, or a confirmation for his life upon which a remainder may be dependent, were in favour of that opinion. Mr. Justice Littledale said, if the possession of the mine were not in the copyholder, it would be difficult to say to what extent any portion of the subsoil belonged to him. Although the property in the mine might be in the lord, he had not such a possessory right in it as to entitle him to maintain trespass against a wrong-doer. The copyhold tenant had such a possessory right, and might recover substantial damages for any actual injury done to the surface, and

(*k*) 17 Ves. 281.

nominal damages for a trespass committed below the surface (*l*).

It may be concluded from the above case that an action of trespass would be equally maintainable by the copyholder against the lord, if the mines were worked without injury to the surface. The tenant would still be entitled to defend his right of possession (*m*).

But if the minerals are once severed from the inheritance, whether by the copyhold tenant, or by any stranger, the lord will be entitled to recover them in an action of trover. They are then in the same condition as trees which have been blown down or felled. They are no longer part of the freehold, but personal chattels belonging to an owner whose right of possession has accrued (*n*).

Such is the law with respect to minerals, in the absence of any special custom. But the authorities which have been cited also acknowledge, that either the copyhold tenant, or the lord, may, by special custom, have acquired an exclusive right to them ; that the former may have thus gained a right of property as well as a right of possession, and that the latter may have still retained his original power to enter and take possession of his property (*o*).

In the great Cornwall case of Rowe *v.* Brenton, the owner of a conventionary tenement, which was held in fee from seven years to seven years, renewable for ever, claimed the copper in his lands, in opposition to the claims of the Duchy of Cornwall. This copyhold tenure pervades all the manors of the duchy. The question of right seems to

(*l*) Lewis *v.* Branthwaite, 2 Barn. & Ad. 437.

(*m*) See Mitchell *v.* Dors, 6 Ves. 147.

(*n*) Player *v.* Roberts, W. Jones, 243; Bishop of Winchester *v.* Knight, 1 P. Wms. 406; Rowe *v.* Brenton, 8 Barn. & C. 737; Halcomb, p. 15; 3 M. & R. 133.

(*o*) Gilb. Ten. 327; Bishop of Winchester *v.* Knight, supra; Bourne *v.* Taylor, 10 East, 196; Rowe *v.* Brenton, supra; Parrott *v.* Palmer, 3 Myl. & K. 632. See also 13 Co. 68; 1 Leon. 272; Ashmead *v.* Ranger, 1 Raym. 551; 3 Salk. 638; reversed in D. P., Hanmer *v.* Chance, 34 L. J., Chanc. 413.

have been agitated previous to the year 1763 (*p*). It was decided against the tenant in an action of trover, both at the trial at nisi prius, and at the trial at bar, in Westminster Hall. On the latter occasion, Lord Tenterden observed to the jury that it happened, in many manors, that the lord of the soil was entitled to the minerals, but had no right to enter upon the lands of the copyhold tenants to search for and obtain those minerals without the consent of the tenants, and that all the evidence given by the plaintiff as to the interruption of workings might be explained by the right of the tenant to prevent the owner of the minerals from digging for them without his consent, but that a distinct positive usage for the conventionary tenants to take the minerals would be valid (*q*). The tenant was not able, on either of these occasions, to prove such a usage. The right of property was, therefore, decided to be in the lord. As the action was only one of trover for copper actually raised and severed, there was, of course, no decision with respect to the right of the lord to enter and work the copper mines. But by the recent statutes (*r*) for enfranchising these conventionary tenements, the minerals in them are reserved to the Duchy of Cornwall, with full powers to work them, on payment of compensation. The custom of tin-bounding is not to be affected (*s*).

All copyholders, whether in fee, or for life, or for years, have a possessory interest in mines to the possession of which the lord is not entitled by custom. But it has been held, that a copyholder for life, without power to renew, or nominate a successor, is incapable of acquiring, by any special custom, a proprietory right over trees (*t*). It is presumed a copyholder for years would be in the same

(*p*) Halcomb, p. 58.

(*q*) 8 Barn. & C. 766; Concanen's Rep.

(*r*) 7 & 8 Vict. c. 105, and 11 & 12 Vict. c. 83.

(*s*) See Chap. XVI.

(*t*) Mardiner *v.* Elliott, 2 T. R. 746; Gilb. Ten. 237.

condition. A similar principle would probably be held to be applicable to mines, though the point has never been discussed. The law favours the claims of the copyholder, on account of the permanency of his interest. *Cessante ratione cessat lex.* But such cases must not be confounded with those in which particular estates are only carved out of the copyhold fee (*u*).

When the lord is entitled to work the mines of the manor, he or his grantee cannot make use of the works in the copyhold lands, for transporting the produce of other lands which are not within the manor, and which belong to independent owners. In a case of this kind, an injunction had been applied for, and the defendant demurred for want of equity, alleging, that the bill had not stated that any injury or irreparable damage had been committed. The demurrer was allowed by Stuart, V. C., but was overruled, on appeal, by Campbell, L. C., who said, the defendant had no right to extend the use of the underground tramway to the coals raised in lands not within the manor, and that the amount of injury, if infinitesimally small, was immaterial in considering whether the demurrer should be allowed or overruled. It had been argued, that the plaintiffs were confined to an action of trespass, or some other legal remedy. But the defendant was charged with making a profit by the surreptitious use of the way, and with having broken the soil of the copyholder for the purpose of working the other mines, and of ventilating them by the breaking of barriers. All this was not a mere dry trespass for which a Court of Equity would supply no remedy. The averments in the bill might not show conclusively that the plaintiffs were entitled to an injunction, or to an account, or to discovery. Upon answer and evidence, it might be shown that acquiescence, or minuteness of injury, or some undisclosed right of the defendant might cause the injunction to be

(*u*) Denn *d.* Joddrell *v.* Johnson, 10 East, 266.

refused, and the bill to be dismissed. But the demurrer, for want of equity, could not be maintained (*v*).

In the above case, a distinction was drawn, in the judgment, between the possession of a copyhold owner, which reaches to the centre of the earth, and that of a freehold owner of the surface, where the minerals belong to another owner as a separate tenement. But this distinction does not appear to be generally correct. In either case, when particular portions only of the strata or the minerals—as beds of coal, for instance—belong to the mine proprietor, with powers to work, the owner of the surface will retain his right of possession to all below it, subject to such exceptions, and he would be enabled to object to any use of the subjacent parts for working the minerals of any adjoining owner;

"Quantum vertice in auras
Ætherias, tantum radice in Tartara tendit."

In like manner, when the whole of the mines and minerals, either in copyhold or in freehold lands, belong to the mine proprietor, with powers to work, the same right of possession, as a general rule, remains with the owner of the surface (*x*). In the freehold case, the possession is only so far divested as may be necessary for the rightful purposes of the mine proprietor. Although he may hold the mines as a separate inheritance, he would not on that account alone be enabled to work the adjoining mines, without special powers for that purpose founded on grant, exception, or prescription. If any grant or prescription could be so construed as to manifest the intention that certain portions of the subsoil were to be held and enjoyed in the same manner as the different floors or stories of a house are sometimes held, the right of external working might be asserted. But in other cases, he would only have rights

(*v*) Bowser *v.* Maclean, 2 De Gex, F. & J. 415; 30 L. J., Chan. 273.

(*x*) See Greathead *v.* Morley, 3 Man. & G. 139; 10 L. J., N. S., C. P. 246.

relating to his own mines. Of course, such questions cannot arise in those copyhold cases where there is no right in the lord to work the mines.

It remains to be seen under what circumstances nominal or substantial damages can be recovered. The right of working adjoining mines by underground communications is often very valuable, and the owner of the surface, who can maintain an action of trespass, may claim a right to participate in the profit, or to prevent the continuance of the trespass, although he may have suffered no injury on the surface.

There does not appear to be any objection to the working of excepted or manorial mines by means of adjoining mines, in cases where the right to work is not disputed.

It has been decided, that either a custom or prescription which claims a manorial right to work mines under any messuages or buildings, without making any compensation for the damage occasioned to them, but only for the user of the surface, is unreasonable and invalid (*y*). In this case, an injunction had been applied for and refused, with a direction to bring an action at law (*z*). This action was brought in the Court of Queen's Bench, and was heard on demurrer. In another case (*a*), which arose in the same manor, and was in fact against the same defendant, he justified his acts by a plea of sufficient compensation for surface injury. There was no question of buildings. On the trial at bar, in the Common Pleas, the compensation was found by the jury to be sufficient, and the Court directed a verdict for the plaintiff on another plea of the defendant, which claimed the right generally without mention of compensation, on the ground that a prescription for the lord to work and the landowner to

(*y*) Hilton *v.* Lord Granville, 5 Q. B. 701; 13 L. J., N. S., Q. B. 193.

(*z*) Ibid., 4 Beav. 130; 1 Cr. & P. 283; 10 L. J., N. S., C. C. 398.

(*a*) Paddock *v.* Forrester, 1 Dowl. P. C., N. S. 527; 11 L. J., N. S. C. P. 107.

receive compensation was indivisible. This subject is discussed in the subsequent chapter on injuries.

In a case where rocks had been dislodged from cliffs situate in the land of other owners, and scattered over or imbedded in copyhold lands, in which the copyholder had no claim to the minerals, it was held, he could not sell or dispose of them unless they had been shown to have been detached by some accident or convulsion of nature, since the time of his admission to the tenement. For they had become portions of the soil. But he might remove them for the benefit of his tenement (*b*).

In a case of ejectment for forfeiture, the copyholder claimed the unlimited right to dig clay in his own tenement for making bricks for sale, without the license of the lord. It was decided by the Court of Exchequer, and, on appeal, by the Exchequer Chamber, that the custom was valid. It was contended that such a custom was inconsistent with the right of the lord, who had an interest in the soil, and might extend to take away the soil itself, to his prejudice, in case of escheat and forfeiture. But it was held, that there was no distinction between a custom to take all the timber, or all the minerals in copyholds, and a custom to take the clay (*c*). This decision was affirmed in the House of Lords. It was observed by Lord Cranworth, that it was not easy to define what was called a reasonable custom, as between a lord and the copyholders—that the relation between them must have had its origin in remote times, by agreement, when he was the absolute owner of the soil, and they were his tenants at will—that any restrictions he imposed, or any rights they demanded, were within the competency of the lord to grant, or the tenants to stipulate for—and, if evidence could be given of what was then agreed on, and of its being acted upon since, it was difficult to see how it

(*b*) Dearden *v.* Evans, 5 M. & W. 11; 8 L. J., N. S., Exch. 171.

(*c*) Salisbury (Marquis) *v.* Gladstone, 6 Hurl. & N. 123; 30 L. J., Exch. 3; 2 F. & F. 256.

could be declared void as unreasonable. A distinction was drawn between a case affecting only the lord and a particular tenant, and the cases which affected other copyholders, as Broadbent *v.* Wilkes, Wilson *v.* Willes, and Hilton *v.* Lord Granville (*d*).

It does not appear to have occurred to the learned Judge (Wightman, J.), who delivered the judgment of the Appeal Court, that clay was a mineral, and that the case, on that ground, could not have been otherwise decided.

When the minerals in copyhold lands belong to the lord of the manor, they do not form an inheritance distinct from the freehold, but are part of the demesnes of the manor. But in the grant of wastes, or in the enfranchisement of copyhold lands, the mines and minerals will not be reserved by the common reservation of all seigniories, royalties and jurisdictions. These must be mentioned in express terms;—if not, the minerals will become the property of the owners of the surface, and part of the same inheritance, and all preceding contracts and leases will enure for their benefit (*e*).

A copyholder, though not absolutely entitled to the trees upon his lands, may, by custom, be entitled to cut down and use them for repairs and the necessary purposes of his occupation (*f*). The same right may exist with respect to minerals; and a copyholder, though not entitled generally to any description of minerals, may, by custom, acquire a right to take and use any material, as limestone, marl, clay, and gravel, for the same purposes (*g*). For if custom can give a copyhold tenant a general right to minerals, it may also give him a limited ownership over them. Indeed, it appears probable, that such a privilege

(*d*) Ibid., 34 L. J., C. P. 222; 9 H. L. Cas. 703.

(*e*) Townley *v.* Gibson, 2 T. R. 701.

(*f*) Heydon *v.* Smith, 13 Co. 68; 2 Brownl. 319; Godb. 173; Ashmead *v.* Ranger, 1 Lord Raym. 551; 3 Salk. 638.

(*g*) Gilb. Ten. 327.

would exist of common right, and without reference to custom (*h*).

The same law applies to all lands in which the freehold is vested in the lord, in whatever manner the tenant's interest may be passed, as, for instance, lands of the tenure of customary freehold. For an owner may have a freehold *estate*, but still the freehold *tenure* may remain in the lord (*i*).

In the recent acts for the enfranchisement of copyhold and customary lands, provision is made for the rights to mines (*j*). By the compulsory statute, it is declared that no enfranchisement shall affect the mineral rights of the lords of manors or any tenants without their express consent in writing.

In the purchase of a freehold under these statutes it has been held, that the vendor is not obliged to produce the title of the lord of the manor, and that an agreement to purchase, entered into after the passing of the first Enfranchisement Act, and before that of the second act, must be considered as made with reference to the acts, and to be subject to reservations which had been made in favour of the lord under the second act (*k*).

These acts have been amended by 21 & 22 Vict. c. 94. The copyhold commissioners are empowered to act in framing awards of enfranchisement in cases of disagreement between the lord and any tenant. After enfranchisement, the owner has full power to disturb or remove the soil for making roads or drains, or for buildings, or for procuring water, without prejudice to the mining rights reserved by the last act.

(*h*) See Heydon *v.* Smith, supra.

(*i*) Stephenson *v.* Hill, 3 Burr. 1278; Doe *d.* Reay *v.* Huntington, 4 East, 271; Brown *v.* Rawlins, 7 East, 409; Portland (Duke of) *v.* Hill, 35 L. J., Chanc. 439.

(*j*) 4 & 5 Vict. c. 35, ss. 39, 82, 84; 15 & 16 Vict. c. 51, s. 48, and 21 & 22 Vict. c. 94.

(*k*) Kerr *v.* Pawson, 25 Beav. 394; 27 L. J., Chanc. 594.

The feudal or universal tenure, in Scotland, corresponds with the English copyhold tenure. But the customs are uniform; and the estates of the superior and the vassal are distinct and separate. In the absence of express contrary stipulation, the superior is entitled only to feuduties and perpetual rents; but the vassal has a freehold estate, which extends *a cœlo usque ad centrum*, and which of course includes the mines, and full powers to work them.

Section III.

IN COMMON AND INCLOSED LANDS.

By presumption of law, the lord of the manor is entitled to the exclusive property in the soil of all common and waste lands of the manor, and consequently to all mines and minerals therein, for the tenants have no other interest than to take the herbage by the mouths of their cattle (*l*).

This interest of the lord, as in copyholds, is not conferred by custom. It is a right reserved to him out of his original grant, and is only proved by custom (*m*). This right, therefore, remains valid till it is impeached by evidence which may show a different ownership, either in the commoners or in strangers (*n*).

It has been decided that a prescription by copyholders to have the sole right of pasture upon a common, in exclusion of the lord, may be established (*o*). For, though

(*l*) Bolton *v.* Lowther, 2 Dick. 677; Horsey *v.* Hagberton, Cro. Jac. 229; Cooper *v.* Marshall, 1 Burr. 265; Sadgrove *v.* Kirby, 6 T. R. 486; S. C. in error, 1 Bos. & Pul. 17; Filewood *v.* Palmer, Mos. 169; 5 Vin. Ab. 7.

(*m*) Folkard *v.* Hemmett, 5 T. R. 417, n. (*a*). See Wentworth *v.* Clay, Fin. Rep. 263; Boulcott *v* Winmill, 2 Camp. 261; Northwick *v.* Stanway, 3 Bos. & Pul. 346.

(*n*) See Co. Litt. 261 a, note 205.

(*o*) Hoskins *v.* Robins, 1 Mod. 74; 2 Saund. 324; 2 Keb. 842; 1 Lev. 123; 2 Pollexf. 13; 1 Ventr. 123, 163. See also Potter *v.* North,

the interest of lord is such, that a custom for his entire exclusion from the profits of a common would be held unreasonable, and could not be maintained, yet his right to any of the minerals or to the trees would show the requisite participation in the profits. For the same reason, the lord, by participating in the right of pasture, or in any other way, may, by custom, lose all claim to the minerals.

This right of the lord to the subjacent soil, in the absence of custom or express grant, is of so strong a nature, that it may be exercised to the destruction of the herbage, and to the partial if not the absolute exclusion of the rights of the commoners (*p*). His authority, in this respect, is quite distinct from that derived from the Statute of Merton, and does not depend upon a sufficiency of herbage being left to the commoners (*q*). It would be difficult to define any limit to the exercise of such a right of the lord (*r*). His claim is paramount to the privileges of the manorial tenants. His interest in the soil is the remnant of an estate once absolute and free from control.

In the case of Bateson *v.* Green, the lord claimed a right to dig clay in a common already insufficient to supply herbage for the commoners. It was held by the Court of King's Bench, that the lord might have such a right, and that the evidence supported it. Lord Kenyon observed, that if the lord had only a right to dig clay for his own use, or had any other limited right, then his digging for sale would have been an excess. Mr. Justice Buller, who was an eminent mining lawyer, added, that the extent of the several rights of the lord and the commoners depended altogether on immemorial custom; that where there are

1 Vent. 383; 1 Saund. 347; 2 Keb. 513; 1 Lev. 268; North *v.* Coe, Vaugh. 251; 1 Lev. 253; 2 Bulst. 87, n. (6); Co. Litt. 122 a; Kentick *v.* Pargiter, Cro. Jac. 208; Yelv. 129; Douglass *v.* Kendal, Ibid. 256; Pitt *v.* Chick, Hut. 45.

(*p*) Bateson *v.* Green, 5 T. R. 411. See Clarkson *v.* Woodhouse, 5 T. R. 412, n.; 2 T. R. 392.

(*q*) 20 Hen. 3, c. 4; and see 13 Edw. 1, st. 1, c. 46.

(*r*) See Arlett *v.* Ellis, 7 Barn. & C. 366, 373; Rogers *v.* Taylor, 1 Hurl. & N. 828; 26 L. J., Exch. 203.

two distinct rights which encroach on each other, the question was, which was subservient to the other?—that in general the lord's was the superior right, because the property of the soil was in him; but that if the custom showed it was subservient to the commoners, then he could not use the common beyond that extent; but there the evidence showed that the lord had always dug the common, when, where and in what manner he pleased, though for a great number of years past there was not a sufficiency of common for the tenants.

Some doubt was thrown upon the correctness of these opinions in the judgment in the late case of Hilton *v.* Lord Granville (*s*). But there is a clear distinction between copyhold lands, in which the tenant has the possession, and common lands, where the right of possession is wholly vested in the lord. The estate of the lord in commons is of superior origin and power to that of the commoners. In customary lands he claims the right of property in mines as part of his freehold inheritance, but he claims the right to work them by prescription, as they are in the possession of others. In common lands he has never lost possession of any part, and that possession, once absolute, is still sufficient to secure to him the full benefit of his first rights. For all presumed grants of common must be held to have been made subject to the existing and concurrent interests of the lord. He is restrained by statute from arbitrary acts of inclosure, which would defeat the acquired rights of the commoners; but he is not amenable for any acts which are necessary for the full enjoyment of his own rights, even if these acts should tend altogether to deprive the commoners of their pasturage.

In a suit for specific performance, it was objected that the mines agreed to be purchased were situate under a common where others had a right of common, and consequently the purchaser would be subject to actions for

(*s*) 5 Q. B. 701; 13 L. J., N. S., Q. B. 200. See last section.

sinking shafts to work the mines: Lord Eldon, after remarking upon the improbability of any obstruction from the commoners, said, that in case of any action a farthing damages would be sufficient, and decreed a specific performance (*t*).

In the above case, the mines were sold together with an estate, but it does not appear whether the vendor was the lord of the manor, or how he acquired a right to the mines. It is submitted, that if his right fell within the scope of the preceding observations, a commoner could have no pretence for claiming even a farthing damages.

The right of the commoner to the surface is thus subservient, under such circumstances, to the right of the lord to take the minerals, but the exercise of that right must be *bonâ fide*, and unattended with malice. On one occasion, the Court of King's Bench held, that if the lord exercised the right of taking stone wantonly, and so unnecessarily to interfere with the commoners' right of pasture, he would be liable to an action, but not, if he acted honestly in getting stone as occasion required (*u*).

A prescription, or an actual possessory title, which gives the right to the minerals of a common to the commoners, must, as in other similar cases, be evidenced by distinct acts of ownership.

Thus, an action of trover was brought for copper ore raised upon Towan, in the parish of St. Agnes, Cornwall, by the lessees of the lord of the manor, who was entitled to the toll of tin in all the lands, both customary and freehold, and also in the wastrell or common called Towan Common. The defendant was a lessee of the owners of six tenements in Towan vill, who were exclusively entitled to the herbage, and five of which tenements were freehold and one customary freehold. It was proved, that these owners had received dues of copper in respect of sets

(*t*) Anon. Chanc. 7th Sept. 1803, MS. See Sugden, Vend. and Purch. vol. 2, p. 184.

(*u*) Place *v.* Jackson, 4 Dow. & R. 318.

granted by them for twenty or thirty years. It was insisted at the trial, that the lord of the manor was entitled to the copper under the waste, but Bayley, J., said, that though the general presumption of law was, that the soil of the waste was in the lord of the manor, yet it might be shown by evidence of acts of ownership to be in the tenants of the six tenements. A verdict was found for the defendant, and a new trial was afterwards refused on the ground of adverse possession (*v*).

It has been said before that the lord cannot, by custom, be entirely excluded from the profits of a common. In the case just cited, it appears that the lord had no right either to the herbage or to the copper mines, but his right to the toll of tin still existed.

But it is presumed the lord may possibly lose his claim altogether to any part of the surface or subsoil of a common, by neglecting to assert his rights by acts of ownership, or by his title not being otherwise acknowledged. If, for instance, the minerals are worked by strangers, who, in the course of time, are enabled to establish a title to them by prescription, both against the lord and the commoners, it must be inferred that a grant of the minerals has passed from the lord to the owners, who, with respect to the participation in common rights, will thus stand in the situation of the lord. The lord himself may also be deprived of all profits of the common by his own express act, and for a valuable consideration (*w*). Whether his title to the minerals has been transferred by usage, or by express grant, it cannot, at any rate, be supposed that his being thus deprived of any part of the profits would invalidate the existing rights of the commoners.

It appears, then, that the right to the minerals of a common may be vested either in the lord by presumption of law, or in the commoners themselves by prescription

(*v*) Curtis *v.* Daniel, 10 East, 273.

(*w*) See Doe *d.* Lowes *v.* Davidson, 2 Maul. & Sel. 194.

founded on custom, or actual ownership of the soil, or in strangers, by express grant or sufficient acts of proprietorship.

In the first case, the minerals are part of the demesnes of the manor, and the possession of them as well as the property in them being vested in the lord, the right may be exercised without much reference to the concurrent interests of the commoners. In the second case, the possession of the minerals will be equally vested in the commoners, but the right cannot in general either exist or be exercised to the utter exclusion of the lord or his grantees from the profits of the common. In the third case, the mines will form a distinct possession and inheritance.

But it must not be concluded, that in cases where the general right of the lord to the minerals is not disputed, the commoners are necessarily excluded from all claim to any part of them, or that the right of the commoners should in every case exclude a similar claim on the part of the lord.

There be also divers others commons, says Lord Coke, as of estovers, of turbary, of piscary, of *digging for coals, minerals* and the like (*x*).

It would appear, however, that when the right to the minerals remains in the lord, the tenants can then only claim a *restricted* right to take and use any of them.

In one case (*y*), the rights of the tenants of a manor to dig for gravel and sand on the wastes was acknowledged, and it was held that the lord could not inclose, under the Statute of Merton, against such a right or any right of estovers. But this opinion was qualified in a subsequent case (*z*), which held that inclosures might be made against such rights, if a sufficiency of common was left for their

(*x*) Co. Litt. 122 a; Stile *v.* Butts, Cro. Eliz. 434.

(*y*) Duberley *v.* Page, 2 T. R. 391; but see 7 T. R. 745.

(*z*) Shakespear *v.* Peppin, 6 T. R. 741.

exercise. In an action between the same parties, the defendant pleaded that he entered for the purpose of digging "for the necessary repairs of the defendant." The Court of King's Bench held, that in pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, it was necessary to allege that the house was out of repair, that the party entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of the house, and that the materials were used for the purpose (*a*).

A right of turbary is confined to such a quantity as is sufficient for the house to which the common is appendant (*b*). The same rule seems to apply to the right of the tenants to take stones and other minerals for their houses, for the repair of their buildings, and the improvement of their lands. But in all cases such rights must be claimed and exercised for the purposes of actual improvement. In one case, a custom was set aside, because it was not defined to what sort of improvement the custom extended. It was not stated to be in the way of agriculture or horticulture. The Court said, it might mean all sorts of fanciful improvements; there was nothing to restrain the tenants from taking the whole of the turbary of the common and destroying the pasture altogether. A custom of that description ought to have some limit, but there was there no limitation but caprice and fancy, and such a claim was inconsistent with the rights of all the other commoners, as well as of the lord (*c*).

When common lands are inclosed under an act of parliament, and there is no provision as to the tenure, the allotments will be of freehold tenure, even if the ancient lands are of a different tenure (*d*). This, however, is

(*a*) Peppin *v.* Shakespear, 6 T. R. 748.

(*b*) Tyrringham's case, 4 Rep. 37.

(*c*) Wilson *v.* Willes, 7 East, 127.

(*d*) Doe *d.* Lowes *v.* Davidson, 2 Maul. & Sel. 175; Townley *v.* Gib-

usually provided for by the act, and the right to the minerals is generally reserved to those who are supposed to be entitled to them. If the minerals are not expressly mentioned in the act, it would seem that the several owners of the allotments will be interested in them according to the nature of the tenure, for they will not be reserved under the ordinary clause saving all royalties (*e*). If the lands awarded are freehold, the right to the mines must, therefore, belong to the owner of the surface, as part of the freehold. If copyhold, the right would seem to remain in the state in which the right to all mines in copyholds is adjusted in the absence of special custom, that is, the right of property will be in the lord, and the right of possession in the tenant, unless the right was previously acquired by the commoners by custom. If leasehold, the right will subsist in the manner pointed out in a succeeding chapter (*f*).

The rights of all other persons but those whose interests are clearly intended to be barred by the act, including, of course, those who may have acquired an independent interest in the mines of a common, will be reserved by the general saving clause (*g*).

In Townley *v.* Gibson there was a subsisting lease of the mines from the lord at the time of procuring the act of inclosure. The mines had ceased to be worked. But it was held that the lessor's interest in the lease passed to the owners of the allotments.

In one act of inclosure, it was directed that the allotments to the commoners should be deemed to be within the township in which the lands of the commoners were situate. It was held, that the rights and liabilities of the owners of coal mines, either worked or unworked, under the allotments, were not altered by the act (*h*).

son, 2 T. R. 701; Revell *v.* Jodrell, 2 T. R. 424; Doe *d.* Sweeting *v.* Hellard, 9 Barn. & C. 789.

(*e*) Townley *v.* Gibson, supra.

(*f*) Chap. IV.

(*g*) See 41 Geo. 3, c. 109, s. 41.

(*h*) Rex *v.* Pitt, 2 Nev. & M. 363.

There has often been much difficulty in giving a proper construction to acts of inclosure, many of which have been informally drawn. In a case before cited (*i*), the reservation for the lord was of "all mines and minerals." A subsequent clause, enabling the lord to work, specified "the lead ore, lead, coals, ironstone and fossils." It was held, that stone also was reserved, and that the reservation was not confined to metallic minerals. In another case, it was declared that the lord's seignorial rights were not to be prejudiced, except the right to the *soil*, and that he might thereafter enjoy all mines and minerals, as if the act had not been passed. It was held, that the word *soil* meant surface, and that the lord retained his mineral rights (*j*). In another case (*k*), the act directed an allotment to be made for the getting of stone for highways and "for the use of the inhabitants" of the parish. It was held, that the right of the latter was limited to the repair of roads, and did not extend to the purpose of burning lime into manure.

In another case, where the lord was previously entitled to the minerals of the common, the Inclosure Act neither recited his rights nor made any *express* reservation of them; but it was enacted, that an allotment should be given to him for his right in the soil, and also for the damage he would sustain by being obliged to make satisfaction to the proprietors of the lands in getting the minerals. It was also enacted, that if the lord should enter into the lands for taking the minerals, he should make satisfaction accordingly. It was held, that the lord did not take a mere right to work, but that the minerals were reserved to him by implication (*l*).

The general act of inclosure, 41 Geo. 3, c. 109, s. 32, authorizes a sale of part of the common lands for defray-

(*i*) Earl of Rosse *v.* Wainman, 14 Mee. & W. 859; 15 L. J., N. S., Exch. 67; affirmed in error, 2 Exch. 800.

(*j*) Pretty *v.* Solly, 26 Beav. 606.

(*k*) Rylatt *v.* Marfleet, 14 L. J., N. S., Exch. 305; 14 M. & W. 233.

(*l*) Micklethwait *v.* Winter, 20 L. J., N. S., Exch. 313; 6 Exch. Rep. 644.

ing expenses, and declares the lands so sold to be discharged from all common and other rights therein. But a special act, which reserves all the mines directed to be *divided and inclosed* to the lord, will control the operation of that clause, so as to preserve the lord's right, even in the allotments sold; and the meaning of the word "soil" will be confined to the surface, if a contrary construction would defeat the reservation (*m*).

In the recent statute for facilitating the inclosure, exchange, and division of common lands (*n*), it is directed that the mines belonging to the lord may be reserved to him in the regulated pastures, and in the allotted lands may become the property of the owners. When the mines are held distinct and separate from the surface they are not to be affected by the act or the inclosure, and the rights of existing lessees are reserved.

By a still later statute, 22 & 23 Vict. c. 43, it is enacted, that when the mines are excepted, the provisional order of the inclosure commissioners shall specify whether the right to enter and work the mines after inclosure is to be reserved, and whether any compensation is to be given for damage to the surface. The owners of the minerals and of the lands to be inclosed may agree on the mode of compensation, and the agreement shall form part of the award. When the right to the mines is reserved by any provisional order, with the right to work them, the third section gives specific powers for that purpose. In case compensation is to be paid by the owners collectively, it may be assessed in a summary way by any two justices of the peace. The amount is to be paid by a rate according to the value of the allotments, and may be levied by distress.

An inclosure cannot be promoted without the assent of persons interested to the extent of, at least, two-thirds of the whole interest in the lands. In one case, the mines

(*m*) Wakefield *v.* The Duke of Buccleugh, 36 L. J., Chanc. 179.

(*n*) 8 & 9 Vict. c. 118, ss. 96—98.

and minerals had been reserved to the lord on payment of compensation. There was valuable brick earth in the lands which could be worked by him on the surface, but the surface would be so far destroyed. It was held, that he was entitled to be included in the account of assents and dissents in respect of the value of the brick earth, and to participate in the division of the lands, in addition to his one-fifteenth share as owner of the soil (*n*).

The injuries occasioned to inclosed lands by mining operations are discussed in a subsequent chapter.

Section IV.

CUSTOM AND PRESCRIPTION.

When mines form a distinct inheritance, and are not attached to the ownership of the lands in which they are situate, or form part of the demesnes of a manor, a title to them may be acquired and lost in the same manner as to a common estate of freehold. But it has been seen that an ownership in mines and minerals may also be acquired by custom or prescription, and by persons in whose favour the law presumes no right at all. It may, therefore, be proper to consider in this place the general qualities of a custom and of a prescription with reference to our present subject, and upon what evidence they must depend.

Prescription differs from custom in being annexed to a particular person, and in not being properly a local usage. It may exist either as a personal right, exercised by a man and his ancestors, or as attached to the full ownership in fee of an estate, and limited to such owners (*o*). It is therefore capable of being released; a custom cannot be discharged. In many respects, a custom and a prescription have common properties, and they have often been too much confounded in legal discussions.

The existence of a custom is, at all times, a question to

(*n*) Church *v.* The Inclosure Commissioners, 11 C. B., N. S., 664; 31 L. J., C. P., 201.

(*o*) 1 Inst. 113 b.

be determined by a jury, and not by the judges, unless the same question has already been submitted to a jury, determined, and entered upon the records of the same court (*p*). But after the custom is found, it is for the court to pronounce upon its validity (*q*). A court of equity will, at the request of the parties, refer it to the Master to inquire and report concerning an alleged custom (*r*).

A verdict in an action in favour of, or against customary commoners, and others claiming under the same right, is admissible in evidence (*s*). But such a verdict is not conclusive, and, however ancient, will not avail against a recent and uniform usage of many years (*t*). A decree in chancery is also admissible (*u*).

A custom may be disproved by depositions made in a suit instituted against a former lord, by witnesses for a person claiming to be admitted under an alleged custom; and it is not material that the same custom should have been in controversy in the former suit (*v*).

In general, the customs of one manor are not admissible to control or explain the customs of another manor (*x*); but there are exceptions to this rule. Evidence has been admitted to show that a custom may affect a whole district of manors which have sprung from some common origin, or have been subject to a corresponding train of circumstances, by which their mutual relation to each other may be established (*y*). But this practice cannot prevail in

(*p*) 1 Black. Com. 76; Mortimer *v.* Petifer, Cro. Jac. 302; Jewell *v.* Horwood, 1 Roll. Rep. 263; Edwin *v.* Thomas, 2 Vern. 75.

(*q*) Bastard *v.* Smith, 1 Mood. & Rob. 129.

(*r*) Edwards *v.* Fidel, 3 Madd. 239.

(*s*) Reed *v.* Jackson, 1 East, 357; The City of London *v.* Clerke, Carth. 181; Bull. N. P. 233.

(*t*) Biddulph *v.* Ather, 2 Wils. 23; Curtis *v.* Daniel, 10 East, 277.

(*u*) Brown *v.* Rawlins, 7 East, 429.

(*v*) Freeman *v.* Phillips, 4 Maul. & Sel. 486. See Cort *v.* Birkbeck, Doug. 219; Nichols *v.* Parker, 14 East, 331; Weeks *v.* Sparke, 1 Maul. & Sel. 679.

(*x*) Somerset *v.* France, 1 Stra. 154; Fortes, 41; Dean and Chapter of Ely *v.* Warren, 2 Atk. 189; Roe *v.* Parker, 5 T. R. 30.

(*y*) 1 Lord Hale de Jure Maris, pars prima, c. 6; 1 Hargrave's Law Tracts, 34. See Ruding *v.* Newell, 2 Stra. 957; Stanley *v.* White, 14 East, 338, 341; White *v.* Lisle, 4

opposition to evidence deduced from direct acts which may have been asserted in any particular manner, from which a variety of right may be inferred, and where the custom is not uniform.

In the case of Rowe *v.* Brenton (*z*), it was offered in evidence that toll of copper had been received from other manors than that in which the locus in quo was situate. It was objected, that evidence of custom in one manor cannot be admitted to prove a custom in another, unless both at the time of legal memory were in possession of the same person, and formed part of the same district, and that the tenure was not the same throughout the several manors referred to, some being of the tenure of ancient demesne, and the others of a different tenure. It was admitted in reply, that it was difficult to say what was the tenure of the conventionary tenants in the manors; but it was urged, that in each of the manors ever since the 7 Edw. 3, and perhaps long before, there had been conventionary tenants; that in each there was an assession court held once in seven years, at which the conventionary tenants came and renewed their holdings; that, in all the manors, they took for seven years; and that this similarity affecting all the manors was sufficient to show that they formed one district under the same lord, where he had in all probability reserved throughout similar rights to himself in the grants made to the tenants bearing the same description. The evidence was admitted. Lord Tenterden, C. J., after pointing out the similarity of tenure, said it was very peculiar, and not known in any other part of the country, but certainly belonged to all those called free conventionaries in the district; must they not then, in fairness, in order to ascertain what were the relative rights of the lord, and those tenants, in one part of this district, inquire what were their rights in another? It appeared to him, that plain reason and common sense required it, without

Madd. 224; Champian *v.* Atkinson, 3 Keb. 90; King *v.* Ellis, 1 Maul. & Sel. 662; Rowe *v.* Brenton, 8 Barn. & C. 758; 3 Man. & Ry. 144, 229.

(*z*) 8 Barn. & C. 758.

resorting to decided cases, or nice and subtle distinctions, as to whether the matter in dispute be in the nature of tenure or custom. That was not, properly speaking, a question of tenure, nor a question of custom, such as the course of descent attached to the tenure, but a question as to what the lord parted with to those who were called conventionary tenants. The other judges concurred in this opinion.

We have before seen the application of this rule with respect to certain freehold lands bearing a distinct designation, and liable to a custom pervading an ascertained district within the manor (*a*).

When commons have been inclosed under an act of parliament, a custom to work mines without leaving support to the surface cannot be established against one owner by proving specific acts in the lands of another owner (*b*).

The customs of one manor cannot prove those of another manor, as both being in the same parish and in the same leet, even when one manor is held of another manor by subinfeudation, unless it were shown that the subinfeudation occurred between the time of legal memory (Richard I.) and the Statute of *Quia Emptores*, or very shortly before that time (*c*). It was observed by Lord Abinger, C. B., that it was the custom of the crown, in very old times, to declare of which manor another manor should be held, but that gave no identity of custom; that in late times crown manors had been granted to be held of the manor of East Greenwich; that in the border manors of the North of England, there was a particular kind of tenure called tenant right, that passed by lease and release, and had peculiar customs; that, it being admitted, that in these manors all the tenants hold under the

(*a*) Barnes *v.* Mawson, 1 Maul. & Sel. 77. See Sect. 1.

(*b*) Blackett *v.* Bradley, 31 L. J., Q. B. 65; 1 Best & S. 140.

(*c*) Marquis of Anglesea *v.* Lord Hatherton, 10 M. & W. 218; 12 L. J., N. S., Exch. 57.

same right, if it happened that in one particular manor no example could be produced of what was the custom in a given case, it might be reasonable to show the general usage; and that another connexion which might admit of this kind of evidence occurred in the mining districts of Derbyshire and Cornwall, where particular customs prevailed. Alderson, B., said that the customs of manors were created by immemorial usage, and that there was no proof that the customs of the manor in question might not have originated after it parted from the other manor, if it ever belonged to that manor, and yet be beyond legal memory. Rolfe, B., considered that the cases cited in favour of the reception of the evidence were only analogous to proving that in certain places the tenure of Borough English or of gavelkind prevailed, and then inquiring into the customs of those tenures in other manors.

In the same case it was also held, that a deed made by certain copyholders in 1605, and which purported to ascertain and agree upon the customs, and in which the lord for a valuable consideration ratified the customs, so far as they related to specified tenements, and also a decree in chancery confirming the agreement, were admissible on the part of the lord to negative a custom on the part of the copyholders to take the minerals, which were not mentioned in those documents.

In a case of customary freehold lands, a customary or inquisition of the customs of the manor was produced, which appeared to have been prepared about the reign of Edw. VI. The only paragraph relating to minerals was a power for the tenants to dig stone, coals and marle, as estovers, for their own use—which was construed to be confined to the waste lands, and not to apply to the ancient lands. There was also a decree in 1578, after the inquisition, which settled some disputes as to the right of working coal in the wastes, but was silent as to coal in the ancient lands. In support of the right of the tenant to work coal on these lands, it was shown, that coal had

been worked by tenants in some particular tenements, but not in those of the present claimant, for 110 years. There was proof of the surrender of the surface distinct from the mines, of license from the lords by way of lease, of a surrender of the lease, of a surrender of the mines, and of actual working under that surrender—also, of coal pits having been worked in certain other ancient inclosures. It was held, on the authority of the case last cited, that, though there might be good evidence of a grant from the lord in respect of particular tenements, no general custom could be established in contravention of the manorial inquisition, and that the customary tenant had not shown any right to work coal in his ancient lands (*d*).

It was objected, in the above case, that it was inconsistent that the tenants should have less right to estovers on their own inclosed land than on the wastes which belonged to the lord. It was held, that such inconsistencies existed in most cases of estovers, and might originate in the unwillingness of the lord to have the land devoted to cultivation disturbed by open workings.

Reputation alone is not sufficient to establish a custom (*e*), much less to repel a presumption of law. A right to mines, therefore, founded on custom, must be evidenced by proper documents, or by undisputed and notorious acts of ownership. The latter kind of evidence is always the most satisfactory, and is capable of creating a title at complete variance with documentary evidence. The production of grants, leases, and licenses, unaccompanied with evidence of actual usage, will be entitled to little weight (*f*). But in the absence of any recent acts of proprietorship,

(*d*) Portland (Duke of) *v.* Hill, 35 L. J., Chanc. 439.

(*e*) Weeks *v.* Sparke, 1 Maul. & Sel. 690; Morewood *v.* Wood, 14 East, 330; Doe *d.* Foster and another *v.* Sisson, 12 East, 62; Bull. N. P. 248; Corkman *v.* Mather, 1 Barnard. 14.

(*f*) Rowe *v.* Brenton, Halc. Rep., per Parke, J.; Brown *v.* Rawlins, 7 East, 409.

such documents may often be valuable as containing evidence of former acts.

Entries of presentment in the books of a manor are not evidence of acts of ownership on the part of the lord (*g*), nor, it is presumed, on the part of the tenants.

The court rolls of a manor are considered as evidence for the benefit of both the lord and the tenants (*h*). But they are only evidence for those parties, and not for or against strangers (*i*). Court rolls are not, however, strictly records, and, therefore, the courts will admit an averment of any error in them (*j*). Copies of court rolls, under the hand of the steward, and examined copies, sworn to be true, are also admissible (*k*). Entries of the steward, above thirty years old, need not be verified by proof of handwriting, and of death (*l*). A copyholder, by indorsement of his name on the record, under 3 & 4 Will. 4, c. 42, ss. 26, 27, is a competent witness for proving a custom to work stone within the manor (*m*).

In the case of Rowe *v.* Brenton (*n*), it was held, that, on account of the interest of the crown in the Duchy of Cornwall, all acts which affect the possessions or revenues of the duchy are to be considered as public acts. It was allowed to give in evidence a caption of seisin to the use of the Duke of Cornwall by persons assigned to do the same by his letters patent, and also the counterpart enrolment of a lease by the Duke, without evidence of the loss

(*g*) Irwin *v.* Simpson, 7 Bro. P. C. 317.

(*h*) Warriner *v.* Giles, 2 Stra. 955; Humble *v.* Hunt, 1 Holt, 601; Love *v.* Bentley, 11 Mod. 134; Parrott *v.* Palmer, 3 M. & K. 638.

(*i*) Att.-Gen. *v.* Lord Hotham, 1 Turn. 217.

(*j*) Snow *v.* Cutler, 1 Keb. 567; Brend *v.* Brend, Fin. Rep. 254; Burgess and Foster's case, 1 Lev. 289; 4 Leo. 215; Hill *v.* Wiggett, 2 Vern. 547; Doe *d.* Priestly *v.* Calloway, 6 Barn. & C. 484; 9 Dowl. & R. 518.

(*k*) Snow *v.* Cutler, supra; Lee *v.* Boothby, 1 Keb. 720; Chance *v.* Dod, 2 Barn. 406; Street *v.* Roper, 12 Vin. 214; Rowe *v.* Brenton, 3 Man. & R. 296.

(*l*) Wynne *v.* Tyrwhitt, 4 Barn. & Ald. 376.

(*m*) Hoyle *v.* Coupe, 9 M. & W. 450; 11 L. J., N. S., Exch. 258.

(*n*) 8 Barn. & C. 737.

of the original. There was also admitted an extent of crown lands found in the proper office, purporting to have been taken by a steward of the King's lands, following in its construction the directions of the stat. 4 Edw. 1, and which was presumed to have been taken under competent authority, although the document was not signed, and did not contain any statement of the authority by which it was taken, and no commission was found. There were also received the answers of tenants to interrogatories put to them at an assession court, 1 Eliz., without producing the interrogatories, which had been searched for but could not be found. But in the case of the Duke of Beaufort *v.* Smith (*o*), a book from the custody of the plaintiff, purporting to be a survey of the year 1650, after the manor had been granted to Oliver Cromwell, taken under a commission given by him, was rejected as being neither a public document nor evidence of reputation (*p*).

It has been held that a book in which copies were made of counterparts of leases granted by the Bishop of Durham, which was kept in the office of the Bishop's auditor, was a public muniment, and may be received in evidence to sustain the claims of a lessee, the counterpart being lost, and the original not produced (*q*).

In the case of the Bishop of Winchester *v.* Knight (*r*), Lord Chancellor Cowper is reported to have observed that a custom empowering the tenants to dispose of one sort of mineral, as coals, might be an evidence of their right to dispose of another sort of minerals, as lead out of mines.

This evidence may certainly be conclusive in the absence of other evidence, and under such circumstances it might

(*o*) 4 Exch. 450; 19 L. J., N. S., Exch. 97.

(*p*) S. C. Smith *v.* Duke of Beaufort, 13 L. J., N. S., C. C. 33; 1 Phil. 209; 1 Hare, 507.

(*q*) Humble *v.* Hunt, 1 Holt, 602, per Wood, B. See Lord Pomfret *v.* Smith, 6 Bro. P. C. 440; Outram *v.* Morewood, 5 T. R. 121; 3 East, 346.

(*r*) 1 P. Wms. 406.

prove of great importance. But its effect upon the right to the other minerals might be entirely destroyed by proof of acts of ownership having been asserted over any of the latter kinds of minerals. There may, in fact, be two customs, or indeed as many customs as there are kinds of minerals found in the lands. The voice of custom is capable, not only of determining the general right of property in minerals, but of establishing different ownerships in different substances.

This was decided in a case in which it was contended, that the undisputed right of the lord to the tin mines under all the lands of the manor was decisive to show that he was entitled to all other minerals. Lord Ellenborough, in delivering judgment, asked why there might not be two customs, one for the lord of the manor to have the tin, and another for the tenants to have the copper under their estates and the waste in question; and observed, that the usage which established the right of the lord to have the one, would also establish the right of the tenants to have the other (*s*).

Where there are different customs, regulating the ownership of different kinds of minerals, it must, of course, be concluded that the general right to the other minerals, to which no distinct claim has been established, will remain vested in the person presumptively entitled to the whole.

A single instance may, under some circumstances, prove the existence of a custom (*t*). One undisturbed act, said Lord Ellenborough, in another case, does not make a custom, but it will be evidence of a custom (*u*).

It must, however, be sufficiently clear that such a rule cannot be applicable to mines. There must be a notorious succession of acts committed with the knowledge of the general neighbourhood, and without interruption from the

(*s*) Curtis *v.* Daniel, 10 East, 273.

(*t*) Doe *d.* Mason *v.* Mason, 3 Wils. 63.

(*u*) Roe *d.* Bennett *v.* Jeffrey, 2 Maul. & Sel. 92.

parties interested (*x*). A solitary act may be committed in private, or it may be disowned, and the party committing or authorizing it may think proper to desist from asserting his pretensions.

When a custom is set forth generally, and it be proved that there are exceptions, the variance will be fatal (*y*). A custom, when derogatory from the common law, must be strictly construed (*z*).

There has been much difference of opinion upon the admissibility of hearsay evidence in those cases of prescription, which affect only private rights. In the case of Morewood *v.* Wood (*a*), where the defendant claimed the right, as incident to his estate, to work stone in the waste of the lord, general evidence of reputation was produced at the trial. The Court of King's Bench was afterwards equally divided on the question of reception. Three of the judges thought such evidence could be received as proof of a particular custom; but the modern decisions are against the reception of such evidence (*b*).

A prescription must be exercised reasonably, and must also be certain. Thus, an indefinite claim to take clay from a close for making bricks at a brick kiln at all times and seasons has been held to be unreasonable and invalid (*c*).

In another case, an action of trespass was brought for taking away sand from a close to which it had been drifted from the sea shore. There was a plea of custom, and also a plea of prescription. The former alleged a right in the inhabitants for the time being occupying lands in adjoining parishes to take the sand from the close for manuring their lands. It was held, that the claim as a custom was too

(*x*) Curtis *v.* Daniel, supra; but see 3 & 4 Will. 4, c. 71, s. 4.

(*y*) Griffin *v.* Blandford, Cowp. 62.

(*z*) Bac. Abr. Customs, F.

(*a*) 14 East, 327.

(*b*) Richards *v.* Basset, 10 Barn. & C. 663; White *v.* Lisle, 4 Madd. 214. See Phillips on Evidence, vol. 1, p. 242.

(*c*) Clayton *v.* Corby, 5 Q. B. 415; 14 L. J., N. S., Q. B. 364.

vague, and also that it was void for claiming a profit in the lands of another, which can only be made by prescription (*d*). The sand was considered to be part of the soil, and to be inseparable from it. It was also held, that the evidence for a custom is not evidence for a prescription, nor *vice versâ*. The evidence in support of the prescription was not sufficient to gain a verdict for the defendant, and the court refused to grant a new trial. It was questioned whether private prescription and customary right could exist together with respect to the same matter (*e*).

In mining cases, any permanent injury to the surface, however extensive, may be committed, if it be necessary for the proper enjoyment of the right that is claimed, and that right is proved by grant or usage to the requisite extent. For prescription presumes a grant, or an exception of the nature of a grant, and whatever may be granted may be also claimed by prescription (*f*).

In a case relating to the Forest of Dean, the free miners claimed the right to grant licenses for working stone quarries in the commons of the forest. The decision rested on other grounds (*g*). But it was held by Byles, J., in assisting Wood, V. C., that the claim could not exist by custom, as it was a *profit à prendre*, and not an easement (*h*). It was also held, that it could not exist by prescription; for a claim to carry away the soil of another without limit tended to the destruction of the herbage, and was unreasonable, and also uncertain (*i*).

This case, like some others, must depend on the vagueness and uncertainty of the claim. When a claim does not extend to the whole subject matter, but only to a partici-

(*d*) See Code Nap. art. 686; Inst. lib. 2, t. 3, s. 2.

(*e*) Blewett *v.* Tregonning, 3 Ad. & El. 554.

(*f*) Rogers *v.* Taylor, 1 Hurl. & N. 706; 26 L. J., Exch. 205; Carlyon *v.* Lovering, 26 L. J., Exch. 251; 1 Hurl. & N. 784.

(*g*) See Chap. XVI.

(*h*) Gateward's Case, 6 Rep. 59.

(*i*) The Att.-Gen. *v.* Mathias, 27 L. J., Chanc. 761. See Dyce *v.* Hay, 1 Macq. 305. See also Constable *v.* Nicholson, as to highway repairs, infra.

pation of profit, it must be sufficiently defined, and must be confined within reasonable limits. But such cases cannot apply to rights embracing the whole of certain minerals in lands, with full powers to work them. In such instances, it can only be necessary to show that any specific spoil of ground is inseparable from the proper enjoyment of the rights.

Till recently, legal proof of a custom or prescription was demanded from the time of legal memory, that is, the coronation of Richard the First. The practice of the courts provided a remedy for this injurious rule, and it was held, that proof of undisturbed enjoyment, as far back as living witnesses could speak, raised a presumption of an enjoyment from the time fixed by law (*k*). An uncontradicted usage of twenty years has been held to prove the existence of an immemorial custom (*l*).

In the case of Curtis *v.* Daniel (*m*), it was proved on the part of the defendants, that, for between twenty and thirty years, they had made sets of the copper mines, and that these mines had been worked to a considerable extent, and in a manner which was notorious to the whole neighbourhood, to the plaintiff's agents, and to the former proprietors of the plaintiff's estate; that dues to the amount of above 700*l.* had been paid to the tenants in respect of some lands, and as much more in respect of others; and that the value of the ore raised was ten times the amount of the dues; on this evidence a verdict was found for the defendants, and a new trial was refused. The court observed, there had been an adverse possession for above twenty years, and the case was properly left to the jury.

But a right, claimed by custom or prescription, was subject to be disproved by showing, that it did not or could not exist at any given point of time since the commence-

(*k*) Leuckhart *v.* Cooper, 7 Car. & P. 119; Jenkins *v.* Harvey, 1 Cr. M. & R. 877; 2 Cr. M. & R. 393; 1 Gale, 23.

(*l*) Rex *v.* Jolliffe, 2 Barn. & C. 54; 3 D. & R. 240.

(*m*) Supra, Sect. 3.

ment of legal memory. Thus, it might have been shown, that at some earlier period the mines had been regularly and uniformly worked by other persons than those seeking to establish a customary right. This proof would have defeated the custom of later years. This mischief gave rise to the expedient of supposing the existence of a grant which had been lost, and which was pleaded to have been made by some person in possession of the legal right. Thus, even a grant was presumed against the crown after 100 years (*n*). But in all cases, it was still competent to prove that the supposed grant could not have been made in the manner stated in the plea. The law on this subject has been much altered by the Act for shortening the time of Prescription (*o*).

It is enacted, that no claim which may be lawfully made at the common law, by custom, prescription or grant, to any right of common or *other profit or benefit to be taken and enjoyed from or upon any land* of the crown, or parcel of the Duchies of Lancaster or Cornwall, or of any ecclesiastical or lay person, or body corporate (except the matters afterwards specially provided for, and except tithes, rents and services), shall, when such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto *without interruption* for the full period of *thirty* years, be defeated or destroyed only by showing that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same was then liable to be defeated: and when such right, profit or benefit shall have been so taken and enjoyed for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

(*n*) Mayor of Kingston *v.* Horner, Cowp. 102.

(*o*) 2 & 3 Will. 4, c. 71.

Thus, a right to mines as a separate inheritance may be established after a less period than that required for a mere right to work them.

This statute, which is of much importance in many other respects to mining owners, will be more fully discussed in another chapter.

There are several districts in England in which peculiar customs prevail with respect to the right to mines and the mode of working them. These local customs exist chiefly in Cornwall, Devonshire and Derbyshire, and will be also noticed in an ensuing chapter.

Section V.

MANORS AND REPUTED MANORS.

As the subject of manors is closely connected with the right to mines, a few words on that subject may be here introduced.

In mountainous countries, the boundaries of manors are often open to much dispute. These bounds are sometimes defined in old grants by the natural descent of "Heaven water." The summit of a line of hills may be in some places a black morass, subject also to actual changes of level, where it may be doubtful, for a long space, which way the water may be said to flow, or if it can be said to flow at all. In such cases, where there may be mines, it is advisible to prevent litigation, by setting up boundary stones through the debateable land.

But questions of more importance arise with respect to the division of manors and the lands alleged to be comprised in them. It is well known that, previous to the Statute of *Quia Emptores* (*p*), the free tenants of a manor

(*p*) 18 Edw. 1, Westm. 3.

could alienate their lands in fee, to be held of themselves as *mesne* lords, instead of the superior lord. This was of course the creation of new manors, subject to the general allegiance due to the chief lord, but with jurisdiction and seignorial rights over the inferior tenants. This practice was abolished by that statute as to ordinary manors, and by subsequent statutes with respect to manors held *in capite* from the crown (*q*). Under these provisions there could be no subinfeudations of crown manors, that is, no new manors, since the accession of King Edward the First, and none of other manors since the passing of the Statute of *Quia Emptores*.

A manor, though admitted to be itself held of some superior manor or honour, has a proper legal existence, if it can be shown to have been so separated before the above periods. The royalties, which include the minerals, would, of course, belong to the new manor, and would thenceforth pass with it, unless special custom should have established contrary rights either in the copyhold or freehold tenants, or in the chief lord. But when a manor or reputed manor cannot claim existence before the above periods, the rights of the chief lord must prevail, if the lands can be shown to form part of his present seignory.

When manorial rights are properly preserved by the holding of courts, and by the continuance of other legal incidents, the tenure of lands and their present condition may be generally well determined. But when the manorial rights have fallen into disuse, the copyhold or customary lands may have become freehold, and these, together with the original freehold lands, may have ceased to belong to any manor at all, under the Statutes of Limitation. No lands can become allodial, but they may be held in free tenure directly from the crown. But even in this condition the right to the mines may be claimed by special custom (*r*).

(*q*) 17 Edw. 2, st. 1, c. 6, and 34 Edw. 3, c. 15.

(*r*) Barnes *v.* Mawson, 1 M. & S. 84.

On the other hand, no new copyhold tenure can now be created, except in some special and anomalous case, which need not here be noticed. For the soul of this tenure is custom, and a custom must have existed from the time of legal memory. Although there can be no new tenure, the demesnes of a manor, as in the case of commons, may still be alienated as new copyhold lands; for this operation does not imply the creation of any new custom.

If the services of a manor are severed from its demesnes or merged in them, the manor is lost for ever; for service is the essence of a manor (*s*). It is often said, a manor is lost if there are not two free tenants to hold a court baron. It is not the loss of the court, but the consequent extinction of the services, which destroys the manor. For a court baron is the necessary incident of a manor, and attracts the services (*t*). On the other hand, the right to hold a court baron may exist, without the right of lordship over the manor; for such a right may exist by prescription in other persons.

The existence of a manor may be proved by the original grant, by inquisitions, by court rolls, and other documentary evidence, and by positive acts of dominion. The mention of a manor in a deed only binds the parties to it and the claimants under them, but it is evidence of reputation. Reputation alone is admissible. But it will be left to the jury to decide generally on all the evidence.

When the demesnes of a manor are absolutely severed from the services, and it is lost as a legal manor, it cannot be restored to its original condition. If it has been subject merely to long disuse, the lapse of time will prevent its restoration. Neither the Statute of Limitations of 32 Hen. 8, c. 8, nor that of 21 James 1, c. 16, appear to apply to homage, fealty and other manorial services (*u*), but they are reached by the recent statute of 2 & 3 Will. 4,

(*s*) Sir Moyle Finch's case, 6 Rep. 64; 2 Roll. Ab. 122.

(*t*) Watkins on Cop. 1, 14.

(*u*) See 2 Inst. 95, 96; Beville's case, 4 Co. Rep. 8.

c. 27. Yet, although lost as a legal manor, it may exist as a reputed manor, or a manor held in gross. Thus a court baron may be held if two freeholders can be procured; and the lord may recover arrears of quit rent, and his general right to the soil against the acts of strangers; subject to the provisions of the last Statute of Limitations. Even where there are no courts, the right to the royalties may be successfully asserted (*x*).

(*x*) Soane *v.* Ireland, 10 East, 259.

CHAPTER III.

ROYAL MINES.

According to the law of England, the only mines which are termed royal, and which are the exclusive property of the crown, are mines of silver and gold (*a*). This property is so peculiarly a branch of the royal prerogative, that it has been said, that though the king grant lands in which mines are, and all mines in them, yet royal mines will not pass by so general a description (*b*).

This prerogative is stated to have originated in the king's right of coinage, in order to supply him with materials (*c*). It may be observed, however, that the right of coinage in the earlier periods of European society was not always exclusively exercised by the crown; that the same reason might apply to other metals, as copper and tin; and that in those rude times the prerogative was perhaps as likely to have its origin in the circumstance of those rare and beautiful metals having always been among the most cherished objects of ambition, and which were, therefore, appropriated to the use of the crown, like the diamonds of India, in order to sustain the splendour and dignity of its rank, as well as for its revenue (I).

(*a*) 2 Inst. 577. (*b*) Plowd. 336. (*c*) 1 Black. Com. 294.

(I) In Plowden's Report it is stated, that this right was considered by the Solicitor-General of that day to exist in respect of the excellency of the thing, that the common law appropriated everything to the persons whom it best suits, as common and trivial things to the common people, and, because gold and silver were most excellent things, the law had appointed them to the person who is most excellent, and that was the king. Plowden himself propounds an alchemical theory on the origin and transmutation of all metals, which was no doubt designed to throw light upon the subject, but which, it must be admitted, leaves the law of the case in the same condition as that of the metals. Plowd. 338, 339.

It is not improbable that the royal right arose in Roman times, and was transmitted to successive sovereigns. The Romans usually allowed the customs of a conquered country to prevail with respect to mines. Thus, in Spain, they worked the silver mines, as the Carthaginians had done before them, and in Macedon, where the State had previously monopolized the gold and silver mines, and left those of iron and copper open for private enterprise, the same rights were established (*d*). But it does not appear that either gold or silver were found in Britain in the time of Julius Cæsar, who only mentions tin, copper and iron as being produced. It is expressly stated by Cicero that Britain afforded not even a *scruple* of gold or silver (*e*). This opinion was soon disproved; for the lead mines were extensively worked in the time of Augustus, both for the lead and the silver in it, and there was soon afterwards a great silver coinage in Britain. The subsequent assertion of Strabo and Tacitus, that Britain produced both silver and gold, was certainly true with respect to silver, and might be literally exact with respect to gold (*f*). The richest silver lead mines were probably in Wales, particularly in Cardiganshire. But the Cumberland "*silver mine*" (*g*) was worked as a royal mine probably to the time of Elizabeth (*h*). Hitherto there has been no British *gold mine*, although the yearly produce of this metal has sometimes been of great value.

Whatever reason or origin may be assigned for this right of the crown, and of whatever value that right may be, it has been long decided, not only that all mines of gold and silver within the realm, though in the lands of

(*d*) See Merivale's Hist. of Rome, vol. 3, p. 544, and the authorities there cited.

(*e*) Epist. ad Att. iv. 16; Ep. ad Treb. 8.

(*f*) Tac. Vit. Agric.

(*g*) Northumberland Pipe Roll, A.D. 1226. *Aldeneston* (now Alston), afterwards specified in the royal grants, is mentioned in the Pipe Roll as the *mine of Carlisle*.

(*h*) See 2 Inst. 1290. The miners had special privileges, and the justices of assize went there in their circuit. See Hodgson's Northumberland, vol. 3, part 2, cc. 45, 54.

subjects, belong exclusively to the crown by prerogative, but that this right is also accompanied with full liberty to dig and carry away the ores, and with all other such incidents thereto as are necessary to be used for getting them (*i*).

This right of entry was disputed by Lord Hardwicke in a case where there was a grant from the crown of lands, with a reservation of all royal mines, but not of a right of entry. He was of opinion that there was by the terms of the grant no such power in the crown, and that by the royal prerogative of mines, the crown had even no such power; for it would be very prejudicial if the crown could enter into a subject's lands or grant a license to work the mines; but that when they were once opened, it could restrain the owner of the soil from working them, and could either work them itself or grant a license for others to work them (*j*).

This doctrine was, however, declared by Sir W. Grant, M. R. (*k*), to be liable to considerable doubt, as being inconsistent with the resolutions of the judges in the case just cited from Plowden. It may, therefore, be assumed, that the latter case, which was solemnly decided by all the twelve judges, has never been overruled; and Lord Hardwicke's case was decided also upon other grounds—viz., upon there not being a sufficient probability of there being royal mines at all, to disturb the possession of a purchaser (*l*).

This royal right seems also to have been accompanied with a right to take timber for the use of the mines. In a case relating to the silver mines of Aldeneston (Alston), the landowners did not deny this right, but alleged there was no right to sell the timber (*m*).

It seems formerly to have been a matter of considerable

(*i*) The Queen and the Earl of Northumberland, Plowd. 310, 336. See Dyer, 88 a.

(*j*) Lyddal *v.* Weston, 2 Atk. 20.

(*k*) Seaman *v.* Vaudrey, 16 Ves. 393.

(*l*) See Chap. XII.

(*m*) 2 Inst. 578; 18 Edw. I.

dispute, as to what constituted a royal mine. By some it was considered to be a principle of common law, that, if *any* gold or silver was found in metals of a baser nature, that was sufficient to bring the mine within the definition of a royal mine; while by others a mine was not to be deemed royal unless the quantity of gold or silver exceeded in *value* that of the other metal with which it was mixed. The latter opinion was adopted by three of the judges, viz., Harper, Southcot, and Weston, in the case of the Queen and the Earl of Northumberland (*n*), although they agreed in thinking that, as the defendant, in this case, had confessed the production of some royal ore, he was concluded by his not having proceeded to show the relative difference of value, and that the mine must therefore be presumed to be royal. But all the other nine judges were of opinion that the existence of *any* portion of silver or gold was sufficient to constitute a royal mine. Plowden himself contends, that if the royal metals should bear the expenses of extraction, the whole should belong to the crown, and if otherwise, to the owners of the base metals. This decision occurred in the time of Queen Elizabeth, when the prerogative of the crown was perhaps at its greatest height, and the opinion of the nine judges does not appear to have gained the acquiescence of more recent lawyers. In 1640, the opinion of fifteen leading counsel, amongst whom are the names of Glanvil, Herbert, Grimston, and Maynard, was taken upon the subject. These gentlemen were all of opinion, that, although the gold or silver contained in the base metal of a mine in the lands of a subject be of less value than the base metal, yet if the gold or silver countervail the charge of refining it, or be of more worth than the base metal spent in refining it, this is a mine royal, and as well the base metal as the gold and silver in it belong to the prerogative of the crown (*o*). It may be inferred, from this opinion, that if

(*n*) Plowd. 336.

(*o*) Heton's Account of Mines, p. 21.

the gold or silver did not repay the charges of separation, those metals were not considered as belonging to the crown. But it would appear, that if the royal metals had been found in a pure state, and unmixed with the ores of any baser metal, or if the mixture had been merely mechanical, and not chemical, and the precious metals could have been extracted without necessarily submitting the whole mass to the ordinary smelting processes used in the reduction of the inferior metals, the mine would have been considered a royal mine, without reference to the cost of either production or separation. Silver mines are frequently mentioned as existing in England, but it is very questionable whether gold or silver have ever been found in a pure state in England, though small pieces have sometimes been discovered in Scotland (*p*) and in Ireland. Several pounds of gold have lately been procured from the lead mines of Dolgelly, North Wales, where the vein is described as being interlaced with strings of gold. All the silver said to have been produced in England was most probably extracted from lead, as at present (*q*).

In the time of Queen Elizabeth, a society was established on the part of the crown for the management of royal mines, most probably in consequence of the decision reported by Plowden. Several rules were framed for its guidance, particularly in 1670. The opinion of the fifteen counsel before mentioned seems to have been generally adopted (*r*). But considerable difference of opinion still prevailed in many instances with respect to the actual fact of the royal metals bearing the charges of refinement. The royal refiners and assayers became either less skilful or dishonest. At length, the great case of Sir Carbery

(*p*) Camd. Britt. 915, 923; Boyle on Ores, 182; Martin's Scotland, 339.

(*q*) Pryce's Mineralogia Cornubiensis, 59; Heton's Account of Mines, 2, 5.

(*r*) See Sir John Pettus' Fodinæ Regales.

Price occurred (*s*). This case produced repeated trials at bar, and at nisi prius, and occasioned very considerable excitement in almost all parts of the kingdom. Sir C. Price succeeded at last in effectually precluding the claims of the crown, but the spirit of mining adventure threatened to become extinct from the vexatious and uncertain state of the law. The right of entry in search of royal mines was oppressive in the extreme, for the clause of compensation inserted in the royal patents was usually disregarded, and any mine, which might have been discovered at great expense, seemed liable to be claimed as a royal mine. Valuable mines were concealed, and there was universal distrust. Such a state of things called loudly for a legislative remedy (*t*).

This remedy was at last afforded. An act was passed, declaring that no mine of tin, copper, iron, or lead should thereafter be taken to be a royal mine, although gold or silver might be extracted out of the same (*u*).

This provision was considered insufficient, and another statute was soon afterwards passed (*x*), intitled "An Act to prevent Disputes and Controversies concerning Royal Mines," in which it is recited, that many doubts and questions had arisen upon the first statute, whereby great suits and troubles had arisen to many owners and proprietors of such mines.

It was then enacted, that all owners or proprietors of any mines in England or Wales, wherein any ore was then, or thereafter should be discovered or wrought, and in which there was *copper*, *tin*, *iron*, or *lead*, should hold and enjoy the same mines and ore, notwithstanding that such mines or ore should be pretended or claimed to be royal mines.

The third section, however, gives the crown, or any

(*s*) See Sir Humphrey Mackworth's Mine Adventure Expedient, p. 13.

(*t*) Heton, 27.

(*u*) 1 Will. & Mary, c. 30.

(*x*) 5 Will. & Mary, c. 6.

persons claiming royal mines under it, the right to purchase the ore of any such mines (other than tin ore in the counties of Devon and Cornwall), upon payment, within thirty days after the ore is raised and laid upon the banks of the mines, and before its removal from thence, *but after being washed and made merchantable*, of the following sums, and at the following rates:—For ore in which is copper, 16*l.* per ton; for ore in which is tin, forty shillings per ton; for ore in which is iron, forty shillings per ton; for ore in which is lead, 9*l.* per ton; and in default of payment it is declared to be lawful for the owners or proprietors to sell the ore for their own use.

It is provided by the fourth section, that nothing in the act should alter or make void the charters granted to the tinners of Devon and Cornwall, or any of their liberties, privileges or franchises, or the laws, customs or constitutions of the stannaries of Devon and Cornwall (*y*).

It should be observed, in the first place, that the right of the crown to all mines of gold and silver, in which the ores of those metals are found, in connexion with any other substances than copper, tin, iron or lead, remains unaffected by these statutes, and that the presence of any of the four metals just mentioned would seem to be sufficient to protect the ore against the claims of the crown.

The right of pre-emption, reserved to the crown, and the persons claiming under it, is limited to copper, iron and lead, and to tin found in any other places than in the counties of Devon and Cornwall.

It might be contended that this right should extend equally to those metals specified in the act which contain no silver or gold at all, as to those which do actually contain them. But this construction must be considered to be excluded by the preamble and purpose of the act. Ores unmixed with any portion of gold or silver were undoubtedly the property of the subject before, and as the

(*y*) See Chap. XV.

statute was not intended to apply to those, the right of pre-emption cannot be held to extend to any ores but those which the crown might have pretended to claim.

This act seems to have given universal satisfaction to all mining adventurers, and the society for the royal mines appears to have been effectually broken up by its salutary operation.

It is stated by Sir W. Blackstone, that the crown pays no more for the royal metal than the value of the base metal in which it is supposed to be (*z*). This might certainly be quite true at the time when the statute was passed. But the value of all the metals mentioned in the act has since often and materially varied. At present the price of almost all iron ores is under the sum fixed for pre-emption—2*l.* per ton. But it is quite possible for very rich and peculiar ores, like the red hæmatite, to reach a price considerably above the rate of pre-emption. The price of copper ore is also usually under the sum fixed by the act—16*l.* per ton; but the value of some copper ores now found in this country is much above that sum. In general, the sum fixed for tin ore would be greatly inadequate. It follows, therefore, that if it could be proved that any of the ores just mentioned contained any portion of gold or silver, the crown would have the right of pre-emption at a price which might still seriously affect the interests of the producer.

Silver is not usually found in this country in union with any other metal but lead, though it has been found in Huel Alfred, in Gwinear, Cornwall, in green carbonate of copper, and in Huel Ann, in Phillack, Cornwall, with arsenical pyrites. Gold has been found in Wales, and in the iron pyrites of Wicklow, in Ireland, and Crossgill, in Cumberland, but in very small proportions. On this account little fear need probably be apprehended of the crown being enabled to exercise its right.

(*z*) 1 Black. Com. 295.

A considerable quantity of silver is extracted from lead ores; and the rate of pre-emption has been raised by a later statute (*a*), by which after reciting that in consequence of the lapse of time and change of circumstances, the former rate had been inadequate to the increased expense of raising lead, it is enacted, that the rate shall thenceforth be 25*l.* per ton. Since the passing of this act, the price of unsmelted lead has never been beyond the sum of 15*l.* per ton; and even during the war with France, when the value of lead, like that of other metals, was extraordinarily high, it never reached the sum of 23*l.* per ton. About the year 1807, the price closely approached to that sum, but it is now considerably reduced. Lead adventurers have, therefore, at present, nothing to apprehend from the right of pre-emption. But the rate of pre-emption over all the metals ought to have been permanently fixed by reference to the market price of the day.

In arbitrary reigns, the crown has claimed the right to other mines, as to the Yorkshire alum mines. It was held by all the judges in the reign of James the First, including Coke, that the crown could grant licenses for working saltpetre for gunpowder, in any lands of the subject, for the defence of the realm (*b*). But it is now useless to discuss claims of this kind.

In Scotland, gold and silver belong to the proprietors of the soil, subject to the render of one-tenth of the value of the ores to the crown, free from all charges (*c*).

(*a*) 55 Geo. 3, c. 134.
(*b*) 12 Coke's Rep. 12.
(*c*) Erskine's Inst.; Bell's Princ. of S. Law.

CHAPTER IV.

THE RIGHT TO WORK MINES.

I. *When severed from the Inheritance.*
II. *Persons with limited and qualified Interests.*
III. *Ecclesiastical Persons.*

Section I.

WHEN MINES ARE SEVERED FROM THE INHERITANCE.

It will have appeared from the preceding pages, that a person may have an undisputed right of property in mines, and may yet have no power to avail himself of that right; and again, that a person may have a distinct right of possession in mines, as part of his tenement, without being entitled to exert any act of ownership over them.

Such, we have seen, is the condition of the lord and tenant, in the absence of special custom, with respect to mines in copyhold and customary lands (*a*). There are other persons who, from the limited nature of their interests, or the peculiar quality of their estates, are subject to similar incapacities, and are not permitted to despoil the inheritance by working mines.

It is unnecessary to say that when mines form part of the whole unsevered inheritance, an owner in fee simple possesses, in all freehold lands, an unrestricted right to work the mines in his estate.

It remains, however, to be seen, in what cases the owner of mines is entitled to work them without the concurrence of the owner of the surface, when the property in mines forms a distinct inheritance and possession.

(*a*) See Chap. II.

Mines in this condition are held either by express grant or exception, or by virtue of acts of ownership which have produced an adverse possession against the owners of the surface. In the latter case, the full right to work has been established by the acts themselves. But in all cases it is a general rule of law that when anything is granted, all the means of attaining it and all the fruits and effects of it are also granted. Thus, by the grant of ground, a way to it is also granted, if there be no accustomed way. By a grant of trees there is also passed a power to cut them down and to take them away (*b*). In like manner, a grant of mines also gives the right to work them (*c*), unless there is some positive restraint in the language of the grant itself.

The severance of mines is usually effected by exceptions in deeds of assurance, which transfer the freehold in the surface and reserve the mines. An exception is distinguished from a reservation by its being part of the thing granted and in existence at the time of the grant, while the latter is a right of new creation arising out of the subject of grant (*d*). They are different in legal effect, but in their creation "there is no magic in words," and, if the meaning is clear, either of the above expressions will operate for the purpose designed (*e*). They are also construed exactly in the same way as actual grants. In either case, the law favours their construction by giving them all proper and necessary incidents (*f*). *Nam verba debent intelligi cum effectu ut res magis valeat quam pereat.*

The right to work mines is so inseparable from the grant of them, that it has been expressly decided, not only that the right to enter and work mines is necessarily inci-

(*b*) Shep. Touch. 89; 11 Co. 52 a.

(*c*) Ibid.; Simpson *v.* Tellwright, 2 Lutw. 1247.

(*d*) Shep. Touch. 80; Fancy *v.* Scott, 2 M. & R. 335; Doe *d.* Douglas *v.* Lock, 1 Ad. & El. 744.

(*e*) Co. Litt. 143 a; Dyer, 19 a, pl. 110.

(*f*) Shep. Touch. 100; Bac. Ab., Grants (I), 4.

dent to a grant of mines, without any express authority for that purpose; but that this power cannot be restrained by a special power given in the *affirmative*, which may authorize more acts than would be implied by law, but which will in no wise exclude the full operation of law (*g*).

In that case, Sir Thomas Danby, a former owner of the demesne lands of a manor, had enfeoffed the Earl of Sussex of several closes, excepting and reserving unto himself and his heirs all the coals in the lands and premises, *together with* free liberty for Sir Thomas and his heirs at all times thereafter *during the time that the said Sir Thomas and his heirs should continue owners and proprietors of the demesne lands of Farnley*, to sink and dig pits, or otherwise to get coals in the said land and premises, and to sell and carry away the same with carts and carriages, or otherwise to dispose of the same coals at his and their will and pleasure, making reasonable satisfaction for damages. Afterwards the manor and demesne lands of Farnley were sold by the Danby family to the defendant. An action of trespass was brought by the plaintiff, who was then owner of the lands in question, against the defendent, for entering and working for coal. On demurrer, it was argued for the plaintiff, that the heirs of Sir Thomas Danby having ceased to be owners and proprietors of the demesne lands of Farnley, the defendant had no right to enter and dig pits. It was admitted, that if there had been a general exception of the coal to the feoffor and his heirs, the law would imply a right to get it co-extensive with the reservation; but it was contended that the express liberty to take the coal limited the duration of the privilege by mutual consent and contract. Bayley, J., in delivering the judgment of the Court of King's Bench, took an elaborate view of the subject, and

(*g*) Earl of Cardigan *v.* Armitage, 2 Barn. & C. 197; 3 D. & R. 414.

said, that an exception was always taken most strongly against the feoffor or grantor, and that when anything is excepted, all things that depend upon it, and are necessary for obtaining it, are excepted also. The coals were part of the thing granted, and *in esse* at the time. The consequence, therefore, was, that the property in the coals was never out of Sir Thomas Danby the feoffor, and would have remained in him and his heirs as before, without words of inheritance in the exception, and a right, as incident, to get the coals, and to do all things necessary for the obtaining of them, would have been excepted also. The express liberty was introduced by the words "together with," as if the intention were to increase what had preceded, not to diminish; and he took it to be a general rule, that words tending to enlarge should not, unless the intention was very plain, be taken to restrain (*h*). It might be taken as clear, that an express liberty did not always control what would otherwise exist, especially if the express liberty went beyond what would be implied. To give it a controlling power, the intention that it should have that effect, must be very plain (*i*). The special power had its necessary use, for it went beyond the incidental power which the law would imply. The incidental power would warrant nothing beyond what was strictly necessary for the convenient working of the coals; it would allow no use of the surface; no deposit upon it to a greater extent or for a longer duration than should be necessary; no attendance upon the land of unnecessary persons. The express power gave great latitude in these respects. It had therefore its necessary use, though it worked nothing in restraint of the incidental right which Sir T. D. and his heirs would otherwise have had (*j*).

(*h*) Winter *v.* Loveden, Ld. Raym. 267.

(*i*) Stukeley *v.* Butler, Hobart, 168; and see 8 Ass. 10; Dy. 19.

(*j*) Sug. Law of Real Prop. 88.

This decision was afterwards affirmed in the House of Lords (I).

Thus, a grant or exception uncontrolled by express words of restriction or limitation will give all the powers which are by law considered to be incident to such a grant for the full and necessary enjoyment of it. Any special power, as in the above case, will be limited in its duration and consequences by the particular expressions which confer it.

The nature and extent of these implied powers, and of others arising from express stipulation, will be noticed in subsequent parts of the treatise.

In the case of an exception in a deed of conveyance, a vendor had reserved "all mines and seams of coal, and other mines, metals or minerals." The right to work was given in terms which appeared to apply almost exclusively to mining, as distinguished from open work. On the opening of a freestone quarry in the lands, it was held, that it was intended only to reserve what was usually got by mining in the district at the time of the execution of the deed, and therefore that freestone was not within the exception, and that, at any rate, it could only be worked by mining operations. It was held, on appeal, that the words could not be controlled by the custom of the country, and must be considered to include freestone as a mineral; but that the intention of the deed was to preclude the use of open work (*k*).

In all well-prepared instruments, compensation is provided in such cases for injuries to the surface. But in the

(*k*) Bell *v.* Wilson, 2 Dr. & Sm. 395; 34 L. J., Chanc. 572; 35 Ib. 337.

(I) The report of the case of M'Mahon *v.* Berton, 2 Allen's Rep. 321, was sent to the author from New Brunswick. The Supreme Court there held that a right of entry must be expressly comprised in the exception in a crown grant to enable the crown lessees to work the mines. But the judgment is entirely wrong, and confounds a very simple point with cases of royal mines and copyholds.

absence of express stipulation, it is presumed that proper compensation would still be recovered, unless any words in the instrument itself could be construed to withhold it.

It is scarcely necessary to observe that the above remarks can have no application to mines in copyhold lands which are not absolutely vested in the grantor. The lord may grant the property in mines, but he cannot grant what he may not himself possess—the right of entry to work them. It may sometimes happen, however, that the lord may have made a grant in fee of the minerals in copyhold lands not subject to any special custom, to third persons, and then enfranchises the lands, without excepting the minerals. It might be contended that the mines, as in other freehold lands, formed a distinct inheritance, and that the grantees had then a right to the possession of their property. But it is presumed, the grantees would not be in the situation of parties claiming the full benefit of an unrestricted grant, inasmuch as at the time of their grant no right of entry could possibly be passed from the grantor, and no reservation had been made in the deed of enfranchisement, which might enure for the benefit of the grantor. The consequence would appear to be, that the mines would be severed from the demesnes of the manor, and would form a separate inheritance, as in freeholds generally, but that they would remain as inaccessible to the proprietor as before the act of enfranchisement. But if the grant of the minerals were made for a limited period, the owner of the lands would, in such cases, of course be entitled to them after the expiration of that period (*l*).

When the mines are excepted in a deed of enfranchisement, full powers to enter and work should be given; for otherwise it might be doubted whether the lord or his grantee would be in any better condition with respect to the mines than before. The exception might only operate upon what he is already possessed of. *Illa pars quam*

(*l*) Townley *v.* Gibson, 2 T. R. 701.

retinet semper cum eo est et semper fuit (*m*). But it can confer nothing more, except what may be presumed to have been intended by the nature of the contract. The exception cannot itself form a reservation. The distinction between the two is here material. The mines may be excepted, but the right to work them should, in such cases, be also reserved. The owner of the land grants nothing to which a legal presumption can attach. But the reservation of a right to work will operate, by way of contract, as the grant of a new incorporeal hereditament in favour of the lord.

Section II.

PERSONS WITH LIMITED AND QUALIFIED INTERESTS.

We are now to discuss the rights of those possessed of more limited interests, and we may first consider the privileges of proprietors, when the mines form an unsevered portion of the general inheritance.

Most of the different estates which may subsist in a fee simple can only be created by some of the common assurances recognized by law. It is not unusual to insert, in instruments of this description, distinct powers or reservations with respect to the working of mines. These powers, however, will be reserved for future consideration, and we shall at present confine our attention to the interests of those claiming either by act of law, or under instruments which contain no special clauses or directions with respect to mines.

It may, in the first place, be generally premised, that it is an act of waste to work unopened mines or quarries (*n*), or to produce any change in the land that affects its enjoy-

(*m*) Co. Litt. 47 a; Brooke's Abr. title Reservacion, pl. 46.

(*n*) Co. Litt. 53 b, 54 b; Moyle *v.* Moyle, Owen, 66; Nowell *v.* Donning, 2 Roll. Abr. 816; Manwood's case, Moore, 101; Astry *v.* Ballard, 2 Mod. 193.

ment in the state in which it is received, as by making unaccustomed roads, or giving other rights prejudicial to the inheritance (*o*). Waste has been further defined to consist, first, in diminishing the value of the estate; or, secondly, increasing the burthen upon it; or, thirdly, impairing the evidence of title (*p*).

A tenant in tail has, like a tenant in fee simple, an estate of inheritance in the lands limited to him, but his estate must descend in the particular line marked out for its devolution. Notwithstanding this limited mode of descent, an estate in tail has certain incidents annexed to it which cannot be restrained by any condition, and amongst others is the power of the tenant to commit waste. A tenant in tail, therefore, may fell timber, pull down houses, and open and work mines. But the waste or the act of severance from the inheritance must be committed in his own lifetime, for the heir will be entitled to the remainder as part of the fee (*q*).

The Court of Chancery will never restrain a tenant in tail from committing waste (*r*).

In a case where waste was committed by the assignees of a tenant for life, who was a bankrupt, it was held, that the first tenant in tail was entitled to all the proceeds as the owner of the first estate of inheritance. If the acts had not been wrongful, the assignees would have been entitled for the life of the bankrupt. There was another tenant for life, still living, and who had not taken any part in the waste (*s*). The same rule prevails in favour of a tenant for life, unimpeachable for waste, when the waste has been committed by a deceased tenant for life, who had no right to commit waste (*t*). When waste has been com-

(*o*) Bac. Abr. Waste, 255.

(*p*) Doe *d.* Grubb *v.* Earl of Burlington, 5 B. & Ad. 507.

(*q*) 11 Rep. 50 a; Plowd. 259; Hard. R. 96.

(*r*) Forrester's Rep. 16; Glenorchy *v.* Bosville, Cas. temp. Talb. 16.

(*s*) Lushington *v.* Boldero, 15 Beav. 1; 21 L. J., N. S., C. C. 49.

(*t*) Waldo *v.* Waldo, 10 L. J., N. S., C. C. 312.

mitted by a trespasser the proceeds belong to the owner of the first estate of inheritance, with due regard to the extent to which a tenant for life has been injured (*u*).

A tenant in tail after possibility of issue extinct has only an estate for life in the lands. This estate has, however, been derived from an estate in fee tail; on this account, he possesses more than the ordinary powers of the tenant for life, and having once had the power of committing waste, he is still dispunishable for waste, because he continues in the seisin by virtue of the livery upon the estate tail (*v*). But he cannot commit wanton or malicious waste, in which he will be restrained by the Court of Chancery in analogy to the rule to be presently noticed with respect to a tenant for life without impeachment of waste (*x*). His privileges extinct are also personal, and arise from the privity of estate. His grantee, therefore, will be a mere tenant for life (*y*).

A tenant for life, without being authorized, cannot commit waste. But he will be entitled to take the minerals upon his lands for the purposes of husbandry and repairs. One of the incidents to his estate is his right to *estovers* (*z*). This word has been generally defined to mean an allowance of necessary wood; but there seems reason to contend that the original word *estoffe*, whence comes the English word *stuff*, might comprise all that was necessary for the cultivation and repairs of the estate generally. The statute of Westminster 2, c. 25, gives an assize of novel disseisin de *estoveriis bosci*, which would seem to show that the word was not used in necessary connection with wood. At any rate, there can be no doubt that a tenant for life

(*u*) Bewick *v.* Whitfield, 3 P. Wms. 267; Bell *v.* Wilson, 35 L. J., Chanc. 341.

(*v*) Co. Litt. 27 b; 2 Inst. 302; 1 Roll. Rep. 184.

(*x*) Abraham *v.* Bubb, 2 Freem. 53; Anon. 2 Freem. 278; Lewis Bowles' case, 11 Rep. 83 a; Cook *v.* Winford, Abr. Eq. 221; Williams *v.* Williams, 12 East, 209.

(*y*) Co. Litt. 28 a; Aprice's case, 3 Leon. 241.

(*z*) Co. Litt. 41 b.

may, in all cases, dig for gravel, lime, clay, earth, stone or similar minerals for the repair of buildings and the manuring of the land (*a*). Thus, it is said, if a lessee of land with mines of coals, iron, and stones, digs as much as is necessary for him to use, without selling, it is no waste (*b*). But it is also stated by Coke, if the tenant cut down trees for repairs and selleth them, and after buyeth them again, and employs them about necessary repairs, yet it is waste by the sale (*c*).

But an important distinction has been taken between mines open and unopened. Lord Coke says, "a man hath land in which there is a mine of coals, or of the like, and maketh a lease of the land (without mentioning any mines) for life or for years, the lessee for such mines as were *open* at the time of the lease made, may dig and take the profits thereof. But he cannot dig for any *new* mine that was not open at the time of the lease made, for that should be adjudged waste, and if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine; but if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may dig for mines and enjoy the benefit thereof, otherwise those words should be void (*d*)." It might certainly seem to be the true construction of an instrument granting lands with all mines therein, and the mines were unopened, that the tenant for life or for years should be unimpeachable for waste, and be at liberty to work the mines by express stipulation; *ut res magis valeat quam pereat;* but this doctrine, notwithstanding Saunders' case, where it was first resolved, was denied both by Lord Macclesfield and Lord King in a similar case, in which it was

(*a*) Co. Litt. 53 b, 54 b; Moyle *v.* Moyle, Owen, 67.

(*b*) 2 Roll. Abr. 816.

(*c*) Co. Litt. 53 b. See Countess of Plymouth *v.* Lady Archer, 1 B. C. C. 159.

(*d*) Co. Litt. 54 b.; Saunders' case, 5 Co. 12; Lord Darcy *v.* Askwith, Hob. 296; Hutt. 19. See Code Nap. Civ. 598.

urged, that the mines being expressly granted by the settlement with the lands, it was as strong a case as if the mines themselves were limited to the tenant for life. But it was decided, that a tenant for life subject to waste shall no more open a mine than cut down the timber trees which were equally granted by the deed, and that the meaning of inserting mines, trees and water was that all should pass, but as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him (*e*).

The same reasoning might apply to mines that were opened, which are equally part of the inheritance, but the presumption in favour of this construction of the deed is certainly stronger; for the absence of more express stipulation would seem to show that the land was granted with all its current profits (*f*). In the other case, there was, properly speaking, no mine at all, but only veins or strata. Indeed there can be no doubt that, though a tenant for life subject to waste cannot in any case open mines, he may, in the absence of stipulation to the contrary, proceed to work the mines or quarries that are opened. In this instance, *modus et conventio vincunt legem*, and it is quite competent for a settlor to stipulate that a tenant for life or for years shall not even work the open mines and quarries (*g*).

It has been decided, that a tenant for life, subject to waste, may open new workings to pursue old veins which were open when he came into possession of the estate. An injunction was moved for, but Lord King observed, that the question had been determined in the great cause of Hellier *v.* Twyford, in which he was of counsel, and which was tried at the assizes in Devonshire before Mr. Justice Powell, where it was proved by witnesses to

(*e*) Whitfield *v.* Bewit, 2 P. Wms. 240.

(*f*) Rutland *v.* Greene, 1 Sid. 152; 1 Lev. 107.

(*g*) Ferrand *v.* Wilson, 4 Hare, 383; 15 L. J., N. S., C. C. 41. See Doe *d.* Hopkinson *v.* Ferrand, 20 L. J., N. S., C. P. 202.

be the course of the country, and a practice well known in those parts among the miners, that any person having a right to dig in mines may pursue the mine, and open new shafts or pits to follow the same vein; and that otherwise the working in the same mines would be impracticable, because the miners would be choked for want of air, if new holes were not continually opened to let the air into them; that the same vein of coal frequently ran a great way, and the same mine of coals was very knowable, and easy to be discerned (*h*).

In the same case, it was decided that, to enable a tenant for life to work mines, it is not necessary that they should have been open at the time of the settlement. It is sufficient if the mines are lawfully opened by any precedent tenant in tail, though subsequent to the settlement.

The actual distinction between an old mine and a new mine has never been plainly determined; at least no case is reported. Such questions might be found to be difficult of solution. From the case just cited, it would seem that the pursuit of the same vein or stratum would be permitted to a person claiming to work old mines. There does not appear to be any objection to such a test, if the works were continuous. It might be doubtful, however, how far a mine which had been discontinued could be considered to be still an old mine (*i*), or whether a new bed or vein can be worked by means of an old shaft (*k*). Much would, in all such cases, depend upon the particular facts (*l*).

In a late case, an owner in fee had made some preparations for making clay. There were old pits which had not been worked for twenty years, and it was stated that he had taken some clay from them. But they were not stated to be in a course of working at his death. A tenant for life, under his will, began to dig clay, but an injunction was

(*h*) Clavering *v.* Clavering, 2 P. Wms. 388; Sel. Ch. Ca. 79; Moseley, 219.

(*i*) Ibid.

(*k*) Ferrand *v.* Wilson, supra.

(*l*) See Stoughton *v.* Leigh, 1 Taunt. 410; Bartlett *v.* Phillips, 4 De G. & J. 414.

granted, in order that the state of the pits might be more exactly ascertained (*m*). Cases of this kind will mostly depend on the distinction between suspension and abandonment (*n*).

In a case, where a testator had granted a lease of all the seams of coal and ironstone in certain lands, and only two seams had been worked in his lifetime, it was held, that another seam could be worked by means of the same shaft as part of the old mine; and that the profits of the whole mine were payable to a tenant for life under the testator's will (*o*).

In another case, it was held, that a mine which had not been worked for twenty or thirty years, from the want of profit, might be worked again by a succeeding tenant for life; but that if a mine has been abandoned by the owner of the inheritance many years previously, with a view to some permanent advantage to the property, a succeeding tenant for life could hardly treat that as an open mine. The opening of a fresh pit might, under some circumstances, not amount to the opening of a new mine, but only to the more advantageous mode of working an old one, and might possibly be done without any injury to the inheritance, if the surface of the land where it was opened was of little value to the estate (*p*).

A testatrix was possessed of a moiety of mines at Aroa, in Columbia, South America, and was mortgagee of the other moiety, with power of sale. She devised the mines, with an estate there, to trustees for sale, and the proceeds of the sale were to form part of her residuary personal estate, which she directed to be invested in lands to be settled to the uses declared of her residuary real estate. The tenant for life under the will had spent money in

(*m*) 8 Viner *v.* Vaughan, 2 Beav. 466.

(*n*) See Chap. V.

(*o*) Spencer *v.* Scurr, 31 Beav. 334; 31 L. J., Ch. 808. See also Daly *v.* Beckett, 24 Beav. 114.

(*p*) Bagot *v.* Bagot, Legge *v.* Legge, 32 Beav. 509; 34 Ib. 134; 33 L. J., Ch. 116.

erecting permanent furnaces and works at the Ravenhead Copper Works, near Liverpool, which formed part of that estate. A proportionate increase of rent had been paid by the lessees. The Aroa mines had for some years been unproductive, and had been worked at a loss; but, as the laws of Columbia subjected mines not continually worked to forfeiture, the tenant for life had continued large payments made by the testatrix for keeping the mines in work, and for preventing forfeiture. An offer of 50,000*l.* had lately been made for the mines. On a suit being instituted for the administration of the trusts, the tenant for life was allowed to ask for inquiry respecting the payments made by him for the mines, but not as to the sums paid for the furnaces and works. A general reference was directed as to the Aroa mines, and the contract for their sale, with the view of ascertaining whether the money had been expended for the benefit of the inheritance, and could be allowed by the Court (*q*).

In another case, a tenant for life, impeachable for waste, had cut timber to a large extent, and had worked coal mines, both old and new. A suit was instituted, after the death of the tenant for life, for making his estate liable for acts of waste. A compromise was suggested by the Court for the purpose of avoiding a long and expensive inquiry, increased by the difficulty of determining which were opened and which were unopened mines. The accounts furnished were to be admitted, and certain sums in respect of the timber and the new mines, with interest at 4*l.* per cent. per annum from the day of the death of the tenant for life, were to be charged against his estate, and invested as part of the settled estates. The compromise was not accepted, and a decree was made. An account was directed to be taken of the timber and minerals appropriated by the deceased tenant for life prior to the birth of the first tenant in tail, distinguishing old from new mines,

(*q*) Dent *v.* Dent, 30 Beav. 363; 31 L. J., Ch. 436.

with an inquiry into the circumstances of the old mines having remained dormant, and whether the new pits were opened for facilitating the old workings or for fresh mines. Similar accounts were directed respecting the timber. Upon such account being taken, the sum payable in respect of improper appropriations was directed to be invested as part of the settled estates, and the interest since the death of the late tenant for life to be paid to the existing tenant for life—and the sum payable in respect of such improper acts after the birth of the tenant in tail was directed to be paid to him absolutely, with interest from the times when it was received. All the monies properly received were directed to be invested as part of the settled estates, and the late tenant for life was to be considered to have been entitled to the interest for his life, and, since his death, the interest was to be charged against his estate. It was intimated, that the Court would take the accounts and prosecute the inquiries in the manner most liberal to the deceased tenant for life, particularly after the great lapse of time, which occasioned difficulties as to evidence. An inquiry was also directed as to what minerals were then in existence, and their condition, and whether it would be for the benefit of the inheritance, that any of them should continue to be worked—and also, an account of all profits and monies derived from the working of the mines since the death of the tenant for life, and by whom they had been received, with a declaration that all such proceeds, and all future proceeds, ought to be invested as part of the settled estates (*r*).

An appeal was entered against this decree, and a compromise was effected, with the approbation of the Lord Chancellor, on the terms of payment by the estate of the late tenant for life of the proceeds of the timber and minerals, including minerals won from dormant mines,

(*r*) Bagot *v.* Bagot, Legge *v.* Legge, 32 Beav. 509; 34 Ibid. 134; 33 L. J., Ch. 116.

with interest from his death; so much of such proceeds as had arisen before the birth of the first tenant in tail to be invested and treated as part of the settled estate, and so much as had arisen subsequently to belong to him absolutely.

In the above case, it was said in the Court below that no opinion was expressed as to whether a presumptive tenant in tail would be entitled to the *corpus* of the fund in the same way as an apparent tenant in tail.

The law of Scotland makes no distinction between open and unopened mines in the case of a tenant for life without express powers to work (*s*).

Such is the law with respect to the rights of a tenant for life subject to waste, and we are now to consider the rights of a tenant for life, who is made expressly dispunishable for waste, or who is without impeachment of waste.

It has frequently been decided, that these words only extend to permissive waste, and not to the destruction of the estate itself, and that they will not authorize any malicious or extravagant acts of ownership, as in cutting down ornamental trees, or in wantonly pulling down houses (*t*). It had been decided in an old case at law, that the words, without impeachment of waste, gave the tenant the absolute property in the thing wasted, and courts of equity were for some time prevented by this case from interfering, as it would have been to declare that a man should not be allowed to make use of the property which the law allowed him (*u*). But it has also been held at law, that a tenant for life, under these circumstances, was only exempt from an

(*s*) Swinton *v.* Roxburgh (Duke), Fac. Coll. Eas. 7 Jan. 1816; Ersk. 2, 9, 57.

(*t*) Packington *v.* Packington, 3 Atk. 215; Abraham *v.* Bubb, 2 Freem. Rep. 53; Vane *v.* Lord Barnard, 2 Vern. 738; 1 Salk. 161; Bishop of London *v.* Web, 1 P. Wms. 527; Aston *v.* Aston, 1 Ves. 264; Piers *v.* Piers, 1 Ves. 521; Rolt *v.* Lord Somerville, 2 Ab. Eq. 759; Strathmore *v.* Bowes, 2 Bro. Rep. 88.

(*u*) Lewis Bowles' case, 11 Co. 79. See 1 Ves. 265; Pyne *v.* Don, 1 Term Rep. 55.

action of waste, the penalty of the Statute of Gloucester, the recovery of treble value and the place wasted (*x*).

It seems, however, never to have been disputed, either at law or in equity, that a tenant for life, without impeachment of waste, may open and dig mines at his own pleasure (*y*).

This right will, of course, be accompanied with all the necessary incidents; but if it could be shown that the tenant was exercising his privilege in a wanton or malicious manner, a court of equity, it is presumed, would interfere to control him, in analogy to the principle adopted in cases of the destruction of timber and houses.

A long lease had been granted by a former Bishop of London, without impeachment of waste, and the lessee had agreed with some brickmakers, that they might dig and carry away the soil of twenty acres, six feet deep, provided they did not dig above two acres in the year, and levelled those acres before they dug up others. A bill of injunction was brought by a subsequent bishop, which alleged that this was carrying away the soil, part of the inheritance, and would in consequence turn the pasture field into a pit or pond; that the defendant, in digging all the soil for the bricks, was actually destroying the field. It was urged for the defendant, that frequent experience showed that the digging of brick did not destroy the field, there being many fields about the town where bricks had been dug, and those fields used again for pasture; but that, admitting it was waste, yet there being a power to commit waste, the lessee might do it, as well as open a new mine, and carry away the mineral without filling it up again. Lord Macclesfield said, that the case was within the reason of Lord Barnard's case (*z*), where, as he was

(*x*) 11 Rep. 82; Co. Litt. 220; 2 Inst. 146; 6 Rep. 63; Dyer, 184; Wood's Inst. 574.

(*y*) Plowd. 135; Hard. 96; Tracy *v.* Tracy, 11 Vern. 23; Bray *v.* Tracy 1 W. Jones, 51; Aston *v.* Aston, 1 Ves. 264.

(*z*) Vane *v.* Lord Barnard, 2 Vern. 738; 1 Salk. 161.

not permitted to destroy the castle to the prejudice of the remainderman, so neither should the lessee destroy the field against the bishop who had the reversion in fee, to the ruin of the inheritance of the church. The defendant was permitted to carry away the brick he had dug, but restrained from digging further (*z*).

Every mining operation is *pro tanto* a destruction of the property, and particularly if the surface is interfered with, as happens in almost all cases. Such powers, therefore, must be fairly exercised. In the above case, the lessee was carrying away not the minerals only, but the soil itself.

A jointress, tenant for life, is in the same situation with respect to mines as an ordinary tenant for life, and may be subject to or without impeachment of waste (*a*).

In a case where there was a covenant that a jointure should be of a certain yearly value, and it fell short and the estate was not without impeachment of waste, the court refused to prohibit the jointress from committing waste so far as to make up the defect of the jointure (*b*). But though a court of equity may refuse to lend its assistance in preventing waste in a case when there was such a strong claim for the privilege, yet an action at law might be brought against her, and it does not follow from the above decision that the court would interfere in her favour to restrain the action.

An estate by the curtesy, and an estate in dower, are also estates for life, and the tenants are punishable for waste (*c*); for they cannot, in their origin, be freed from the liability by the consent of parties, their estates being created by act of law (*d*). But, like other tenants for life, they may work open mines (*e*).

(*z*) Bishop of London *v.* Web, 1 P. Wms. 527.

(*a*) Basset *v.* Basset, Finch. 190; Aston *v.* Aston, 1 Ves. 264.

(*b*) Carew *v.* Carew, Abr. Eq. 221.

(*c*) 2 Inst. 299; Stat. of Glouc. 6 Edw. 1, c. 5.

(*d*) See supra in this chapter.

(*e*) Stoughton *v.* Leigh, 1 Taunt. 411.

The right to curtesy extends over the whole lands, and the right to customary dower or freebench is often equally extensive. The right to dower, however, at common law, attaches only to one-third of the lands. Hence arises a difference in the term and nature of the enjoyment of lands held in dower. An interest which extends over the whole land will of course be accompanied with an immediate right of exclusive possession, because it does not interfere with the rights of others—but in other cases, the dower, the right to which only attaches on the death of the husband, must be assigned. Dower ought to be assigned within forty days from that event; and it is not till assignment that the widow acquires an actual estate in the land. It will be afterwards shown how that assignment should be made with reference to mines, and what is the effect of it (*f*).

In a case, where a suit had been instituted for the administration of the estate of an intestate, his widow was declared to be entitled to dower out of an estate containing unopened coal mines. She was then appointed the guardian of her infant daughter, the heiress, and also receiver of the rents and profits. Nine years afterwards, the widow entered into a provisional agreement for a lease of the coal, and the agreement was afterwards ordered to be carried out. The lease was made between the widow as guardian and receiver, the infant, and the lessee. It recited the proceedings in the suit; and in the operative part the infant granted and demised, and the widow, as guardian, granted, demised and confirmed the mines. The covenants and reservations were made in the name of the infant. The widow had paid into court, as receiver, the royalties that had accrued. The widow now claimed dower out of the royalties. But it was held, that the widow had waived her right to dower by her own acts, and that the infant was entitled to the full benefit arising from the lease (*g*).

(*f*) See Chap. VI.

(*g*) Dicken *v.* Hamer, 1 Dr. & Sm. 284; 29 L. J., Ch. 778.

There is little difference between the rights of a tenant for life and a tenant for years. Both hold their estates equally of the grantor, the estate of a tenant for life not being within the provisions of the Statute of *Quia Emptores* against subinfeudation. Both tenants are entitled to reasonable estovers, and to take minerals for the purposes of husbandry and necessary repairs (*h*). They are now equally punishable for waste (*i*), and may both work mines already opened (*k*). A clause of impeachment of waste, when inserted in a grant or demise for years, will have the same effect as when contained in a grant for life, and the lessee will be equally restrainable by a court of equity for committing wanton waste (*l*).

The mines in lands held for terms of years are generally reserved to the owner of the inheritance. If not, neither the lessor nor the lessee can alone work the unopened mines (*m*).

A tenant at will has no power to commit any kind of waste, and an act of waste will determine his estate (*n*). He is not bound to repair houses like a tenant for years (*o*), and therefore has no right to estovers.

A tenant at sufferance has no rightful estate at all, and there is no privity of estate between him and the owner of the land. His continuance of possession, therefore, alone is an act of trespass, much more when accompanied with acts of ownership (*p*).

Tenants by statute and elegit have too uncertain an interest to enable them to do more than take the ordinary profits of the estate.

Coparceners (*q*), joint tenants, and tenants in com-

(*h*) Co. Litt. 41 b.

(*i*) Mitchell *v.* Dors, 6 Ves. 147; Hanson *v.* Gardiner, 7 Ves. 308; Cuddon *v.* Morley, 7 Hare, 202.

(*k*) Co. Litt. 54 b; Astry *v.* Ballard, 2 Mod. 193.

(*l*) Abraham *v.* Bubb, 2 Freem. 63; Bishop of London *v.* Web, 1 P. Wms. 527.

(*m*) See Chap. II.

(*n*) Co. Litt. 57 a.

(*o*) Litt. s. 71; Lady Shrewsbury's case, 3 Rep. 13 b; 1 Show. 288.

(*p*) Co. Litt. 57 b, 270 b.

(*q*) 11 Rep. 49 a, Liford's case.

mon (*r*), are also liable to each other for waste; and actions of account are maintainable for the receipt of more than the proper share of profits (*s*). All such owners may also be restrained by injunction from the wilful destruction of the common property. But they may all concur as among themselves in an act of waste. This concurrence must include all. In one case, five of the owners had authorized the construction of a railroad on the land held in common, against the wishes of the remaining owner, who proceeded to remove the rails, and the Court of Chancery refused to restrain him (*t*).

In a late case, coal mines belonged to tenants in common, who agreed to demise them to a tenant. The mines extended under estates held by the lessors in severalty. The lessee sunk a shaft in one of the estates for working the mines, and the shaft was used for raising coal from adjoining mines, worked also by the lessee. There was no valid agreement, which enabled the lessee to claim this additional right; but he had made payments from time to time to the owner of the estate, in which the shaft was sunk, for the privilege. There was no other access to the adjoining coal. It was held, that all the tenants in common of the mines were entitled to participate in the profit thus realised by the extended use of the shaft (*u*).

Such are the rights of limited or qualified owners, when the mines are unsevered from the right to the surface. But when they form a separate inheritance, it is obvious that the ordinary rules respecting waste have no application. For it would be manifestly absurd to suppose that express grants or limitations of mines in that condition were not intended to be at all times fully enforced or enjoyed. In all these cases, therefore, such owners will have

(*r*) Bac. Abr. Waste, G.

(*s*) 4 & 5 Anne, c. 16, s. 27; Denys *v.* Shuckburgh, 4 Y. & C. 42.

(*t*) Dur. & Sund. Railw. Co. *v.* Wawn, 3 Beav. 119.

(*u*) Clegg *v.* Clegg, 31 L. J., Ch. 153.

the right to work the mines, whether opened or unopened, new or old, according to the duration of their interests, if not otherwise prevented. The privilege to commit waste may of course be enforced in any manner which may sufficiently show that intention.

Coparceners, joint tenants, and tenants in common may either effect a partition or concur in working or demising the mines for the common benefit. But any one of the owners may work or demise his or her own share without reference to the others (*x*). For there can be no action of trespass in such cases, on account of the unity of possession. The remedy of account is, however, always open to those who do not co-operate. This account can only claim the net profits of the shares, with simple interest, probably, at the rate of four pounds per cent. This remedy has, of course, no reference to the Statute of Limitations, which gives a period of six years against trespassers, nor to the measure of damages awarded in those cases (*y*). But if the claim is not made in time, an absolute title to the mines may be acquired by the working proprietor as against the others. It was formerly doubted whether such owners could ever gain an adverse possession against their co-tenants. But it is now expressly provided by the late Statute of Limitations (*z*) that the possession or receipt by such persons of *the entirety or more than the undivided share, or the profits thereof*, shall not be deemed to have been that of the person theretofore entitled. In this way, therefore, an adverse possession may be gained, which, if undisturbed for twenty years by suit or action, subject to the lapse of another period of twenty years, in cases of disability, will at last confer an absolute title.

In a recent case, two persons had each an equitable interest in an undivided fourth part of mines, and the interest of one in her fourth part ceased on the death of another person, and passed to the owner of the other fourth part.

(*x*) See Simpson *v.* Tellwright, supra.

(*y*) See Chap. XIII.

(*z*) 3 & 4 Will. 4, c. 27, s. 12.

She had another fourth part in another right, but she continued in receipt of the profits of both shares as before. The other owner only received the profits of his original fourth part, but this partition of profits only arose from mistake. It was held that this was not an adverse possession of the fourth share that had passed over, inasmuch as both parties had a right to receive, and did during all the time receive, a share in the profits as tenants in common, and that the case then fell expressly within the Statute of Anne, which gave in such cases an action of account against the co-tenant, who has received more than his share, and the equitable relief must be governed by the rule given by that statute (*a*).

This decision is approved of, with some reserve, by Lord St. Leonards, who draws attention to the fact that the statute provides a bar where one tenant in common has been in possession of *more than his undivided share*, or of the profits thereof, for his own benefit (*b*).

A mortgagee has, in law, an absolute estate in the lands mortgaged, and is consequently entitled to take immediate possession after default in payment, and to receive the rents and profits of the estate. A court of equity will never interfere to prevent the mortgagee from exerting these rights (*c*).

With respect to mines, the mortgagee in possession, it seems, will be clearly entitled to work old mines, in satisfaction of his demands, though it has been decided that he is not bound at the utmost to advance more money in a mining speculation than a prudent owner would do. For, as Lord Eldon justly said, if he were owner, he might speculate for himself as much as he pleased, the advantages, whatever they might be, would be his, and if it turned out unfortunate, he would bear the loss. But could a mortgagee be required to do that? Could he be required to

(*a*) Denys *v.* Shuckburgh, 4 You. & Coll. 42. See Roberts *v.* Eberhardt, 2 Eq. 780.

(*b*) Real Prop. Stat. p. 67.

(*c*) Williams *v.* Medlicott, 6 Price, 496. See 2 Mer. 259.

risk his own fortune in speculation, and to incur hazard in an adventure which is ultimately to redound to the benefit of the mortgagor (*d*)?

There can, however, be no doubt that a mortgagee in possession will be accountable for wilful default; and if the nature of the property be such as fairly to demand the expenditure and risk of a prudent owner, he will be answerable for the neglect, for he is bound to make the most reasonable use of the estate, and to satisfy his own claims with due diligence, and the nature of the estate should have been contemplated at the time of mortgage or of taking possession.

On the other hand, it may be concluded, that if a mortgagee in possession exceed the expenditure and risk demanded from a prudent owner, he will be equally accountable for the consequences. He will not be allowed the expenses of an unnecessary or extravagant enterprise, or, it is presumed, of pursuing an enterprise in a useless or chimerical manner, but in both instances he must speculate at his own hazard (*e*).

But although a mortgagee in possession may be, in some cases, bound to prosecute the working of old mines, and quarries, it is submitted that, in the absence of stipulation, he may be prevented from opening new mines. At law, his estate is absolute, and he is therefore subject to no action of waste or trespass; but it has been long decided in equity, where the mortgagor is, until foreclosure or sale, considered to be the actual owner of the land, that a mortgagee shall not be permitted to waste the estate (*f*).

If the security of a mortgagee prove defective, it has been held, that he may cut down timber, and apply the produce to the satisfaction of the interest, and then of the principal, and a court of equity will not restrain him from

(*d*) Rowe *v.* Wood, 1 Jac. & Walk. 555.

(*e*) Hughes *v.* Williams, 12 Ves. 493; Marriott *v.* The Anchor Reversionary Company, 3 Giff. 304; 30 L. J., Ch. 122, 571.

(*f*) Hanson *v.* Derby, 2 Vern. 392.

so doing (*g*). A similar principle has been applied to mines. The burthen of proof of deficiency rests on the mortgagee.

In a case just cited (*h*), the mortgagee had opened a slate quarry. It was decided that he did it at his own hazard; but an injunction was not applied for, and therefore the question of right did not arise.

In a foreclosure suit, where the mortgagee had sufficiently proved that his security was deficient, it appeared that he had let the mines to a company, who had abandoned them after a large loss, and after having paid a small sum for royalty. Three acres and a-half of the surface had been damaged by the lessees, who were not bound by the lease to make any compensation for it. The mortgagor was a mining agent, residing near the mines for the four years during which the mines had been worked under the lease, was aware of all the proceedings, and had made no complaint or remonstrance during that period. He now claimed to surcharge the mortgagee with the value of the ores raised, which was considerable, and of the ground that had been spoiled. But both claims were disallowed. It was held, that the mortgagee had a right to open mines, at his own risk and peril; that he could not charge any amount of loss against the mortgagor, and the whole of any profit must go in discharge of the mortgage debt. It was also held, that the conduct of the mortgagor precluded him from any remedy. It was shown that the spoil of ground was not wanton or improper (*i*).

On the contrary, if a security is not shown by the mortgagee to be deficient, he has no right to open new mines. If he does work them, he will be charged with all the receipts from the mines, without any allowance for the expenses in opening and working them (*k*). In some cases,

(*g*) Witherington *v.* Bankes, Sel. Ch. Ca. 31.

(*h*) Hughes *v.* Williams, supra.

(*i*) Millett *v.* Davey, 31 Beav. 470; 32 L. J., Ch. 122.

(*k*) Thorneycroft *v.* Crockett, 16 Sim. 445; 2 H. L. Cas. 239.

a mortgagee might effect his purpose by an exercise of his power of sale over the mines separately.

A mortgagee had given authority to some adjoining coal owners, who had entered and worked coal. The rent was to be fixed afterwards; but it never was fixed, and the mortgagee, who was never in possession, alleged that he was not aware that any coal had been worked. On a bill being filed for redemption, the coal owners, who were made defendants, pleaded the authority of the mortgagee and the Statute of Limitations. It was held by Stuart, V. C., that they and the mortgagee were equally liable to account for the coal abstracted, without any allowance for expenses. But, on appeal, it was intimated by the court that the coal owners could only be treated as trespassers, and could plead the statute, unless they could be shown to have wrongfully concurred in a breach of trust, of which there was no evidence. The cause was compromised during the hearing with the approbation of the court (*l*).

Mortgagees in possession of a colliery will not be deprived of their costs in a redemption suit for an overstatement of the balance due in the security, and a refusal to furnish an account, except on payment of expenses (*m*).

Mortgagees will not be liable for the wrongful acts of a fraudulent mortgagor, while he is in possession, although they continue, without notice of fraud, in possession of the aircourses and roads in the adjoining lands, and employ the same manager who had committed the fraud, and have always received the proceeds of the trespasses. Nor can they be compelled to close up any communications not made by themselves. But they will be restrained from making any further use of them; and the complainants will be permitted to enter and to close them up (*n*).

In the above case, it was alleged, that the improper working of the coal during the trespasses caused an abso-

(*l*) Hood *v.* Easton, 2 Giff. 692; 2 Jur., N. S. 729, 917.

(*m*) Norton *v.* Cooper, 5 De G. M. & G. 728.

(*n*) Powell *v.* Aiken, 4 Kay & J. 343.

lute loss to the plaintiffs of many thousand tons of coal, which could not be afterwards wrought. In taking the accounts, no allowance was made for the costs of such improper working; but it was held, that a court of equity could not give consequential damages. This reason had ceased to exist, and damages may be assessed by the court with or without a jury (*o*). In other respects, all just allowances were made for the costs of working. The agent was ordered to pay costs of suit, but he was exempted from liability for the value of coal wrongfully worked, as he had got no profit from his fraud.

The Highways Act (*p*) contain several provisions for enabling the surveyors to procure materials. They are empowered to search for and take stone in any waste or common ground, river or brook within the parish or any adjoining parish, but not so as to divert or interrupt the stream, or damage any building, highway or ford, or to work within 150 feet above or below any bridge, dam or wear. They may also gather stones from any lands in the parish, without making any satisfaction to the owners, except for damages done in carrying the stones away, but in all cases either with the consent of the owners or a license of two justices at a special sessions for highways, after summoning and hearing them. But no stones or materials are authorized to be gathered from the sea beach, where the removal might occasion inundation or increased encroachment of the sea. There is also a power to get materials, in case of insufficiency, from any inclosed lands, except from gardens and other specified spots, on making compensation to the owners as well for the materials themselves as for the damages occasioned. By a subsequent act, these "inclosed lands" were made to comprise lands used for agricultural purposes, though not separated by any fence (*q*). Penalties are inflicted for not fencing off

(*o*) See Chap. XIII. s. 2.
(*p*) 5 & 6 Will. 4, c. 50, ss. 52—57.
(*q*) 4 & 5 Vict. c. 51.

pits or holes, or filling up or levelling disused pits or holes, and for damaging or endangering bridges, mills, buildings, dams, highways, roads, fords, mines, tin works or other works.

Surveyors cannot wantonly make roads for the above purposes, but they ought to use existing roads, if they are convenient (*r*).

Surveyors cannot claim a right to take stone from private lands by prescription. It was suggested, that if such a right could be supported at all, it must be alleged as an immemorial custom for the inhabitants of the parish, and that the surveyors were such parishioners (*s*). But this suggestion has been overruled (*t*).

In a case, where a plaintiff claimed the sea beach under an old grant from the crown, and the surveyors pleaded a right to take stone by custom, and also under the Highways Act, and denied the right of the plaintiff, it was held by the Master of the Rolls that the rights were legal, and should be decided by a court of law. It was stated that the plaintiff's house was only a hundred yards from the sea, and that in one year that distance had been diminished fifty-five yards, and that in adjoining parts there had been a great loss of land. It was also stated that there was no other place within some miles where stones could be got. The Court held that it was bound to prevent mischief to the party likely to suffer most, and refused to dissolve an injunction restraining the surveyors (*u*).

In another case relating to the sea shore, it was expressly decided that the inhabitants of a township could not take stones from the land of another person for repairing the highways, either under a custom or by prescription. Such a right cannot be claimed by custom, because

(*r*) Boyfield *v.* Porter, 13 East, 200.

(*s*) Padwick *v.* Knight, 7 Exch. 854; 22 L. J., N. S., Exch. 198. See Oxenden *v.* Palmer, 2 B. & Ad. 236.

(*t*) Constable *v.* Nicholson, infra.

(*u*) Clowes *v.* Beck, 20 L. J., N. S., C. C. 505.

it is a *profit à prendre;* nor by prescription, because the inhabitants are incapable of accepting a grant—not being incorporated, or with any right of succession (*x*).

Such claims may possibly be supported by persons claiming prescriptively by descent (*y*).

Similar provisions were previously inserted in the General Turnpike Act (*z*).

By another act, the surveyors, with the consent of the vestry and a special sessions, may sell any lands of the parish allotted for highway materials under any past or future acts, and purchase other lands for that purpose (*a*).

Section III.

ECCLESIASTICAL PERSONS.

All persons seised of lands in right of the church are said to have a fee simple in those lands, But there is this difference:—A parson or a vicar has only a fee simple qualified, and as he is incapable of doing anything to the prejudice of his successor in many cases, the law adjudges him to have in effect but an estate for life. The fee is said to be in abeyance, and these persons could not have had a writ of right, or effect a discontinuance. But a bishop or dean and chapter, though now incapable of absolutely disposing of their lands, are said to have a sole seisin, were entitled to a writ of right, could have made a discontinuance, and might, previously to the restraining statutes of Elizabeth, have made leases for lives or years without any limitation (*b*), or even alienated the lands in fee, though, in the latter case, there might probably have

(*x*) Constable *v.* Nicholson, 14 C. B., N. S. 230; 32 L. J., C. P. 240.

(*y*) Ibid.; and Lynn Regis (Mayor) *v.* Taylor, 3 Lev. 160.

(*z*) 3 Geo. 4, c. 126, ss. 97—101, and 4 & 5 Vict. c. 51.

(*a*) 8 & 9 Vict. c. 71.

(*b*) Bishop of London *v.* Web, 1 P. Wms. 527; Bishop of Winchester's case, cited Freem. 56.

been a remedy (*c*). By those statutes, all ecclesiastical persons are disabled from alienating the possessions of the church for a longer period than for three lives, or twenty-one years (*d*). But these restrictions do not alter the nature of their seisin. A power to commit waste is usually incident to a seisin in fee. But ecclesiastical waste has been the subject of cognizance, both by temporal and spiritual courts; in this respect, all ecclesiastical owners would seem to be seised in fee only in right of the church. Their estate has been compared to an estate in dower, or for life, and the inheritance has been designated as that of the church.

The earliest case upon this subject is that of an abbot in the king's patronage, to whom a writ of prohibition out of chancery is directed (*e*) to restrain waste. This was followed by the case of the Bishop of Durham (*f*), in the time of Edward the First.

The Bishop, Anthony Beke, who was the warlike and favourite counsellor of Edward the First, had affected many of the privileges of an independent sovereign (*g*), and had committed waste upon the lands of the see to a considerable extent. There was a petition to the king in Parliament, complaining that the bishop had destroyed all the wood, and had erected furnaces for iron and lead and for burning coals. Other grievances were alleged to have been committed on the tenants of the church. It was answered by the king, that the bishop should be prohibited from committing waste by a writ issuing out of chancery.

In the same year an act was passed, granting a prohibition against cutting down the trees in churchyards, but without reference to any other practice or purpose (*h*).

(*c*) Litt. 644, 645, 646, 648; Co. Litt. 341 a, 341 b, 44 a.

(*d*) See Chap. VII.

(*e*) Temp. 3 Edw. 1; 2 Roll. Ab. 813.

(*f*) 35 Edw. 1, Rot. Parl. vol. i. p. 198, No. 46.

(*g*) Cro. Car. 253.

(*h*) 35 Edw. 1.

But it is stated by Sir Edward Coke to be in affirmance of the common law (*i*).

The above case of the Bishop of Durham seems to have sunk into complete obscurity, and it is acknowledged by all that until the time of Sir Edward Coke, the practice was in direct opposition to that case. In one case (*k*), Thiring, C. J., said, that if a bishop or archdeacon should cut down all his wood, he should not be punished at common law. This opinion has not been acquiesced in by subsequent judges (*l*), but it shows the current impression of the times (I).

At length came the case of Stockman *v.* Wither (*m*), in which that of the Bishop of Durham was, after a lapse of three hundred years, again brought to light by Sir Edward Coke, who contended that the answer of the king had a reference to the known course of the common law, and that a prohibition laid at common law against a churchman for committing waste (*n*). In the present case, a prohibition was granted by the Court of King's Bench. Prohibition was also granted by the same court in other cases about that period, in accordance with the opinions of the chief justice (*o*).

(*i*) Liford's case, 11 Co. 49.

(*k*) Year Book, 2 Hen. 4.

(*l*) 1 Bos. & Pul. 122, 130.

(*m*) 1 Roll. 86; 2 Bulst. 279; but see S. C. nom. Bishop of Salisbury's case, Godb. 239.

(*n*) See 2 Roll. Abr. 813, for a case previous to 35 Edw. 1.

(*o*) Sacker's case, 3 Bulst. 91; Moor, 917; Costard's case, 2 Roll. 111. See also Knowle *v.* Harvey, 1 Roll. 335; 3 Bulst. 158; Stampe *v.* Liford, Roll. 100; and Liford's case, 11 Co. 49; Worcester (Dean & Chapter's) case, 6 Rep. 37.

(I) It appears, from a letter addressed to Cardinal Wolsey, when he held the Bishopric of Durham, by his chancellor, that it was considered necessary to procure a confirmation from parliament of many of the privileges exercised by the bishop of that see. It is not expressly stated whether any such confirmation was required for working mines. It might have reference to the right of coinage. But the chancellor urges that step to be taken in strong terms, and then proceeds to mention the mines of coal and lead in the see of York, which was also held by the cardinal, and the mines of lead in Weardale and Hexhamshire, in the see of Durham. *See Letter of William Frankelyn to Cardinal Wolsey*, Cott. Lib., printed in the Allan Tracts.

A prohibition was soon afterwards granted to a patron against a prebendary for cutting down trees, by Lord Keeper Coventry (*p*).

Next comes the case of Rutland *v.* Greene (*q*), in which a prohibition was applied for by the patron against the parson for opening a mine in the glebe lands. The motion was made under the equity of the statute 35 Edw. I. The Court was of opinion that the parson might open and work the mine, on the ground that otherwise none of the mines under glebe lands in the kingdom could be opened. But the Court granted a rule, as this was the only means the patron had of trying his right. It does not appear whether the prohibition was ever actually granted.

In another case, an injunction was granted by Lord Hardwicke, at the suit of a patron, to restrain a rector from digging stones on the glebe. It was said by the chancellor, that a parson could not commit waste, nor open mines. Even a bishop could not. Talbot, Bishop of Durham, had applied to parliament to enable him to open mines, but the application was rejected (I). Parsons might sell timber or dig stone to repair, and they have been indulged in selling such timber or stone, where the money had been applied to repairs. Injunctions had been granted even against bishops to restrain from selling large quantities of timber, at the instance of the Attorney-General, on behalf of the crown, the patron of bishoprics (*r*). It has been since stated, that no such injunctions had been found in the records of the court (*s*).

The subject of waste by spiritual persons was elaborately

(*p*) Acland *v.* Atwell, 2 Roll. Abr. 813.

(*q*) 1 Keb. 557; 1 Sid. 152; 1 Lev. 107.

(*r*) Knight *v.* Moseley, Amb. 176. See also Strachy *v.* Francis, 2 Atk. 217; Barnard. 299; S.C. nom. Bradley *v.* Stratchy. See Duke of Marlborough *v.* St. John, infra.

(*s*) 1 Bos. & Pul. 116.

(I) This bill was for enabling spiritual persons to demise mines, *not accustomably letten*, for twenty-one years, without fines. It was opposed by the dean and chapter, and the local proprietors.

discussed in a case in the Common Pleas. It originated in the Bishop of Durham and his lessee for years uniting to fell and dispose of the timber on the lands of the see. The question decided in that case was only with reference to the jurisdiction of that particular court to grant a prohibition, at the suit of a disinterested person. But a strong opinion was expressed by the court upon the general subject. Lord Chief Justice Eyre, after paying a tribute of commendation to Bishop Barrington, observed, it was by no means impossible that he, as well as many other churchmen, might unwarily have slid into the heavy ecclesiastical offence, which all agreed to be a cause of deprivation, and which might probably be found to be also an injury cognizable by some of the temporal courts. He did not at all regret the expense of time and trouble in that proceeding, since he could not but think it might be productive of very good effects. It might awaken men's minds to the consideration of this question, to which, at that time, it was of importance they should be directed. They had already seen one cathedral church almost in ruins, and with what expense and exertion that church was restored. Had it been in the minds of the clergy and laity for a course of years past, that the woods of bishops, and more especially of deans and chapters, including prebendaries, were a solid, permanent and increasing fund of real property, devolved to them for the sustentation of the cathedrals, palaces and houses of the church, probably that venerable edifice might never have fallen in such ruin, or might have been restored with much less difficulty. Perhaps a time would come when that which he took to be an error would be corrected, and when it would be found that *all* the property of the church is a fund for the sustentation of those fabrics; but that the woods in particular are a specific fund so to be employed no man can doubt. Mr. Justice Rooke observed, that the bishop had for certain purposes a fee simple in the bishopric. But he was seised to a special intent, as a public officer for public trusts. If

before the restraining statutes he had alienated the property of the see, he would have been guilty of a gross breach of trust (*t*).

The case of Knight *v.* Moseley, and the above remarks of Chief Justice Eyre, were fully approved of and acknowledged by Lord Eldon in a late decision. Unless, he observed, the interests of deans and chapters were capable of being distinguished from those of other ecclesiastical bodies in some respect which he was unable to discern, they had a limited right to the timber for the purposes of repairs. He concurred in the remark as to the good effect likely to result from the discussion of such questions (*u*) (I).

The only authority in favour of a more extensive right is that of Rutland *v.* Greene (*x*). In that case, however, it is not clear that the prohibition was eventually refused. There was only a rule to show cause. The only reason against the prohibition seems to be that, if it issued, all the mines in the glebe lands might remain for ever unworked. But such a result, it is conceived, was not necessarily produced then, nor is it the necessary consequence at this time. The parson, with the assent of the proper persons, might have disposed of the whole property, *à fortiori*, committed waste (*y*). A patron might now acquiesce by waiving his remedy, or directly concurring in the act of waste. The prohibition, too, was applied for under the stat. 35 Edw. I. c. ii., which, as we have seen, referred only to trees in churchyards.

It must not be supposed, however, that the identical property, which is the subject of waste, must be applied to the specified purposes. It has been seen that Lord Hardwicke himself propounded a contrary doctrine. In the

(*t*) Jefferson *v.* Bishop of Durham, 1 Bos. & Pul. 105.
(*u*) Wither *v.* Dean and Chapter of Winchester, 3 Mer. 427.
(*x*) Supra.
(*y*) Co. Litt. 44 a.

(I) This good effect was never produced with respect to mines; and the result is, that in some dioceses, and particularly in that of Durham, an immense mass of church property has been wrongfully appropriated.

case just cited, Lord Eldon also said, it had been made a point of some controversy whether an ecclesiastical person is bound specifically to apply the timber he had cut towards the actual repairs for which it was wanted. It was Lord Hardwicke's clear opinion that they were not so restricted, and, if it were otherwise, the obligation imposed upon them would tend greatly to defeat the general intention of law, that the possessions of the church should constitute a fund for the maintenance of the church, if ecclesiastical bodies were compelled in every instance to apply the identical timber by removing it from the most distant parts of the country in which it might happen that their property laid (*z*).

Neither must it be supposed that a prohibition is obtainable by any person who may choose to assert the rights of the church. It was expressly decided in the case of Jefferson *v.* The Bishop of Durham (*a*), that a rector or vicar can only be prevented by a patron, and that a bishop can only be prevented at the suit of the crown, by its Attorney-General, from exercising an unlimited right to commit waste (*b*). The patrons of all other dignities would, on the same principle, be the only persons entitled to apply for this relief from the temporal courts. It may be concluded from the same case, that the remedy is only properly to be sought in the Court of Chancery, by an application for an injunction. A contrary doctrine was promulgated by Sir Edward Coke with great warmth and pertinacity, who maintained, in several instances, the right of his court to dispense this relief, and who invited all mankind to come and pray for it (*c*). But his opinions in favour of this practice have been shown to have been inconsistent and incorrect, and it may be doubted whether the Court of King's Bench, much less the Court of Common Pleas, ever had such a power at all (*d*).

(*z*) 3 Mer. 427.
(*a*) Supra.
(*b*) See also 3 Mer. 427.
(*c*) 1 Roll. 86.
(*d*) 1 Bos. & Pul. 111, 125.

Ecclesiastical persons cannot be restrained from working open mines or old quarries, according to Lord Hardwicke (*e*). In this respect, therefore, they seem to resemble ordinary tenants for life.

But a mine will not be considered to be open when it is worked only by outstroke; nor will any right to work be acquired by any secret dealings of preceding incumbents. Thus, coal mines under glebe lands had been worked for a long period by means of underground communications with adjoining mines, and successive vicars had received compensation for the coal. The surface was never broken, and the circumstances were not shown to have been known to any patron or ordinary. It was held, that the monies received by the existing vicar ought to be laid out for the permanent benefit of the vicarage, as there would be no presumption of a grant for enabling the incumbent to work the mines (*f*).

Although a rector cannot legally commit waste, he may, like other limited owners, take stone or timber for repairs, and other necessary purposes connected with the parsonage property. But he will be restrained at the suit of the patron from selling for other purposes, or for providing any fund for past expenditure or for future repairs. A parson has not so large an estate in the church domain as deans and chapters, and, as a general rule, he must apply the produce of his land to the property of his benefice (*g*).

In another case, where a surveyor of highways had opened gravel pits in the glebe lands under his statutory powers, it was held, that a rector was guilty of waste for having continued to work the gravel in the same pits for sale, and his executors were made liable to the succeeding incumbent for spoil of ground (*h*).

(*e*) Knight *v.* Moseley, Amb. 176; Bunbury *v.* Hewson, 3 Exch. 562.

(*f*) Bartlett *v.* Phillips, 4 De G. & J. 414.

(*g*) Duke of Marlborough *v.* St. John, 5 De G. & Sm. 174; 21 L. J., C. C. 381.

(*h*) Huntley *v.* Russell, 13 Q. B. 572; 18 L. J., Q. B. 239.

In a late case, a rector had agreed, with the consent of the patron, to demise unopened beds of gypsum within the rectorial glebe. One-third of the rents was to be expended or invested for the benefit of the living, and the remaining two-thirds were to be paid to the rector for his own use. The mine was opened and worked with some injury to the surface. The patron, being advised that the agreement was void, as not having been sanctioned by the ordinary or the ecclesiastical commissioners, refused to allow the works to proceed, and filed a bill for an injunction and for other relief. It was alleged in the answer, that the ordinary had given his consent by letter; but the consent was not proved. It was held by Wood, V. C., that, although there was no express decision on the subject, it was clear, that the incumbent could not open mines without the concurrence of the patron and ordinary; that the patron was the proper person to institute a suit, and that he was the only person who could properly interfere, unless it was the ordinary, for preventing any collusion between the patron and the incumbent. A declaration was directed to the effect, that the mine had been unlawfully worked, that an account of the workings should be taken, that any monies not paid over should be laid out for the benefit of the rectory, and that, as the working of the mine would be beneficial to the rectory, inquiry should be instituted as to what steps were proper to be taken for enabling the rector, with the concurrence of the patron, and of all other necessary parties, to carry on the workings, with liberty to the lessee to continue the working, or to abandon his tenancy (*i*).

It will be afterwards seen that all spiritual persons may, with certain consents and restrictions, under a late statute, demise both opened and unopened mines without distinction (*k*).

(*i*) Holden *v.* Weekes, 30 L. J., Ch. 35; 1 J. & H. 278.

(*k*) Chap. IX.

CHAPTER V.

RIGHTS OF WAY, AND WATER, AND OTHER MINING RIGHTS.

I. *General Inherent Rights.*
II. *Rights of Way.*
III. *Rights of Water.*
IV. *The Prescription Act.*

SECTION I.

GENERAL INHERENT RIGHTS.

IT has been seen that a grant or exception of mines confers or reserves a right to work them without express powers for that purpose. For the law will not permit a thing to be given without itself adding the proper means of possession and enjoyment (*a*). But as the law will not authorize acts which exceed the manifest object of the grant, it becomes necessary to inquire into the limit within which these acts are allowed. In leases by competent owners, larger powers are generally given than would be implied by law. But it is frequently necessary to inquire into the powers of the lessor himself. There are also many rights connected with the due enjoyment of mines which affect neighbouring proprietors and inhabitants, and which, therefore, demand careful conduct on the part of the mining proprietors.

As a general rule, the bare right to work mines will be accompanied with the right to use so much of the surface as is strictly necessary and reasonable (*b*). This may

(*a*) Shep. Touch. 89.

(*b*) Rogers *v.* Taylor, 1 Hurl. & N. 828; 26 L. J., Ex. 203.

often be determined by reference to the usage in similar pursuits (*c*); and an owner of mines will not be limited to such appliances only as existed at the time of some remote grant; but he may freely employ the means of modern invention. He will be entitled to erect all adequate modern machinery, as steam-engines, for draining the mines, and for drawing the minerals from deeper workings (*d*). All such rights are construed liberally in favour of the grantee. Mining operations, like all practical and mechanical pursuits, derive gradual improvement from the advancement of the arts and the discoveries of science. The pressure of competition, and increased expenditure, demand that the grantee should fairly participate in the progress of society, and reap the full benefit of his grant. It must be presumed that the grantor intended to give the right to adopt all the means usually employed for the time being in such enterprises. But all expedients, whether old or new, must be strictly subservient to the specified purpose. Thus, an owner of that kind cannot use the surface or any of the materials of the land for changing the character of the mineral to which he is entitled, as for converting for sale coal into coke, clay into bricks, or for smelting the metallic ores, much less for any further purpose of manufacture. For his property can only be procured in its *first* marketable state. To effect this object he may avail himself, subject, often, to the concurrent rights of other owners, of the elements and materials afforded by the land in which his mines are found. Thus, he may use water for cleansing ores and for machinery, make channels and reservoirs, and make and repair roads. In commons this right would probably be held to have a wider extension than in ancient lands; but even in these lands, it is presumed, there would exist a right to take stone or clay for the necessary mining purposes. But this

(*c*) See Case *v.* The Midland Railway Company, 27 Beav. 247; 28 L. J., Ch. 727.

(*d*) Dand *v.* Kingscote, 6 Mee. & W. 174; Dyce *v.* Hay, 1 Macq. H. L. Cas. 305.

right does not extend to timber. Thus, an action of waste was brought against a lessee of the land for felling oak trees for the use of open mines. It was held, that a lease gave no such implied power; and that, as a tenant could not cut wood for the repair of new houses, much less could he do so for acts which impoverished the inheritance (*e*).

It has been seen that the lord of a manor, by general custom, and the tenants, by special custom, may be entitled to the mines in a waste or common. In either case there will be the same line of demarcation between the acquisition of a mineral immediately vendible, and the processes carried on for changing its character. Such processes are quite distinct from mining, and are often carried on at some distance from the mines, and as a separate branch of business. But, independently of this distinction, it has been seen, that when the lord is entitled to the mines of commons, he may, in the legal and proper exercise of his right to work them, even possibly deprive the commoners of all participation in the profits of the common (*f*). But this right to work the minerals will not in itself authorize him to exceed the power of an ordinary commoner, with respect to the erection of smelting or refining works. This object must be accomplished upon a different principle, viz., that arising from the paramount and peculiar authority of the lord over common; and its attainment will depend upon the extent to which he can appropriate and inclose the common lands of a manor without the consent of the other commoners. There can be no doubt that, by special custom, the lord may inclose against commons of every description (*g*). The lord or his grantee (*h*) may also approve part of the common under the powers of the statutes of 20 Hen. III. c. 4, and 13 Edw. I. st. 1, c. 46; and the true limit would seem to be, that, in so doing, he leave a *sufficiency* of common for the tenants of the

(*e*) Lord Darcy *v.* Askwith, Hobart, 234; Hutt. 19.

(*f*) See Chap. II. Sect. 3.

(*g*) Arlett *v.* Ellis, 7 Barn. & C. 346.

(*h*) Glover *v.* Lane, 3 T. R. 445.

manor (*i*). This sufficiency is a question of fact for the jury, and to be determined with reference to the rights of all interested, and the actual circumstances of the case. Subject, therefore, to this restriction, there seems no reason to contend that the lord of a manor may not authorize the appropriation of any common lands for the erection of smelting works, or for any other purposes. But the courts will require, *on his part*, clear evidence to show that the rights of the common have not been improperly interfered with, and that there is a sufficiency of common left for the commoners (*k*).

The lessee of a lord of the manor may, of course, be enabled to exercise similar privileges.

As rights of way and water are of primary importance to mining owners, it is proposed to give these a special discussion.

Section II.

RIGHTS OF WAY.

A RIGHT of way is, of course, one of the most necessary incidents to a right to work mines. The rule has been thus stated:—"Where a man, having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself" (*l*). It is also stated, "In selling two closes and keeping the middle, I shall have a way against my own grant, although

(*i*) Sadgrove *v.* Kirby, 6 T. R. 485; Shakespeare *v.* Peppin, 6 T. R. 748.

(*k*) Smith *v.* Feverel, 2 Mod. 6; Glover *v.* Lane, 3 T. R. 445; Grant *v.* Gunner, 1 Taunt. 438; Arlett *v.* Ellis, supra; Drury *v.* Moore, 1 Stark. 102. See Badger *v.* Ford, 3 Barn. & Ald. 153.

(*l*) 1 Williams' Saund. 323 a; 2 Roll. Ab. Graunt, Z., pl. 17, 18. See also Parker *v.* Welsted, 2 Sid. 39, 111; Dutton *v.* Taylor, 2 Lut. 1487; Buckley *v.* Coles, 5 Taunt. 311.

I may enter by another as convenient" (*m*). The latter part of this dictum is opposed by later cases, in which it has been held, that a way of necessity can comprise no more than the circumstances which raise the implication require; that it is a good answer to such a claim that there is another way which may be used, and that the necessity must continue up to the time of the alleged trespass (*n*).

But in all well-drawn instruments there are express powers with respect to ways.

In an early case, the vendor of a manor had reserved *a convenient way-leave*, such as he and his heirs should think proper, for the carriage of coals through a waste to the river Tyne. The mode of making waggon-ways, by means of timber, was afterwards introduced, and was then in general use in the north of England. A waggon-way having been made under the reservation, a bill was filed to prevent its use, and the Court of Chancery referred the matter for the opinion of the Court of Exchequer, which held, that a waggon-way was not within the reservation; but the Chancellor was of a different opinion, and thought that the new invention was less prejudicial to the soil than a common road (*o*).

Under a grant, made in the year 1787, of a free and convenient way, with liberty to make and lay causeways, and to carry coals, it was held, that the grantee had power to lay a framed waggon-way. It was observed by Ashhurst, J., that no great collieries in the north were without these waggon-ways, and that the defendant could not so commodiously enjoy the way in any other manner. But it was held, that he had no right to make a way *across* the land in question, which was a narrow strip, for the grant only gave such a right over and *along* it (*p*).

(*m*) Palmer *v.* Flessier, 1 Keb. 553; Clark *v.* Cogge, Cro. Jac. 170.

(*n*) Simpson *v.* Tellwright, 2 Lut. 1247; Reynolds *v.* Edwards, Willes, 282; Holmes *v.* Goring, 2 Bing. 76; 9 Moore, 166.

(*o*) Pit *v.* Lady Clavering, 1 Barn. 318.

(*p*) Senhouse *v.* Christian, 1 T. R. 560.

In a later case, which came before the Court of Exchequer, after trial, upon a special case, it was held, that a reservation of mines of coal, with way-leave and stay-leave, involved a right to construct a modern railway (*q*). It was observed by Parke, B., in giving the judgment of the court, that there was no doubt that the object of the reservation was to get the coals *beneficially* to the owner of them, and therefore there passed by it a right to such a description of way-leave, and in such a direction, as would be reasonably sufficient to enable the coal owner to get from time to time all the seams of coal to a reasonable profit; and the owner was not confined to such description of way as was in use at the time of the grant, and in such direction as was then convenient. Adopting that rule of construction, the question was, whether the direction or mode of construction of the railroad were reasonably sufficient for getting the third seam of coal in a manner beneficial to the coal owner. It was found, in the case, "that, without a railway *for shipment*, the lower seams could not be worked without loss, as before stated;" and that statement was, "that 30,000*l.* was expended on the steam-engine, &c., and that for that expenditure there could be no adequate return, unless by the profits of an export trade." If it was meant that this sum was expended to work the lower seams in a reasonably beneficial manner, and therefore that a railway for shipment was necessary for the fair working of those seams, the court could not say there had been anything improper in the direction or mode of construction of the railway, or that there had been any excess in the construction, for the case found that the railroad had been judiciously designed and constructed, and that no unnecessary ground had been taken or injured. The fences and ditches did not appear to have been found to be necessary, and therefore, in respect of these, the plaintiff was entitled to recover.

In a still later case, where a Canal Act empowered cer-

(*q*) Dand *v.* Kingscote, 6 M. & W. 196.

tain mine owners to make any proper railways, it was held, that the railways might be traversed with locomotive engines, though these were unknown when the act was passed (*r*).

It frequently happens, when adjoining mines are in the same possession, that one mine is conveniently worked by means of a pit or level made for another mine. In such cases, it is necessary to give very express powers, as, without these, the rights of mining and transit may be much restricted, even when all the mines are in lands belonging to one proprietor. Thus, where there are separate grants of mines, the minerals in one mine may generally be worked and carried away by means of underground operations carried on in an adjoining mine, without express stipulation, but only so far as regards the lands in which the first mine is situate. The owner of the adjoining lands may have the full power to prevent any operations in his lands, which have no necessary connexion with the mines under them (1). If *all* the mines and minerals in the latter lands were granted or excepted, in such terms as to establish the inference that the full proprietorship of all below the soil of the surface was intended to pass or to be retained, such a power might be held to be lost with respect to the subterraneous works. But, at any rate, the power would subsist with respect to the surface, and there would exist no right to bring the minerals of other lands there.

Similar remarks apply to rights of way and water over the surface. It is often necessary to make express provision with respect to the transit of minerals of many different and even distant lands, and to other materials, and great care is required in giving adequate powers for these purposes.

(*r*) Bishop *v.* North, 11 M. & W. 418; 12 L. J., N. S., Exch. 362.

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(1) In the northern coal fields the first right is called the right of *instroke*, and the other the right of *outstroke*.

For the chief value of a grant may often consist in such privileges.

In a case already cited, an action of trespass was brought by the owner of certain fields under somewhat peculiar circumstances. The township of Amble, in Northumberland, had been sold by Sir W. Hewitt about the year 1630, with a reservation of all mines of coal, with way-leave and stay-leave to and from the mines, together with liberty of sinking pits for winning coal in Amble. The adjoining township of Hauxley, which belonged also to Sir W. Hewitt, was also, at the same period, conveyed to another person with a similar reservation. The lands in both townships had become subdivided amongst different proprietors; and the coal in both townships had been recently purchased by the defendant, who proceeded to sink a shaft in Hauxley, about a quarter of a mile from the boundary of Amble. The pit was so sunk as to enable the proprietor to win a considerable quantity of the Hauxley coal, and all the coal in Amble; but no coal could, of course, be obtained by that means from the township of Amble till a drift had been made from some part of the pit in Hauxley, and part of the Hauxley coal had been worked and extracted. No coal had yet been obtained in Amble. The defendant constructed a railway over the lands of the plaintiff in both townships for the purpose of conveying the coal to the river Coquet, and thence to the sea, and this railway had been much used for the transit of the Hauxley coal. It was held by the Court of Exchequer, per Parke, B., that there could be no doubt that, under the Amble reservation, no easements were reserved, except for getting the coals within the lands in Amble, and that the same rule applied to Hauxley. No greater effect could be given to those deeds in consequence of the contiguity of the two townships, and the fact that the coals in each were part of the same mineral field. The direction of the railway for shipment was proper, though it led to a place where the defendant was a trespasser—as it was con-

venient for the purposes of the coal mine, which was the meaning of the reservation—and whether the defendant would be liable to make amends for wrongful acts in constructing the railroad in another part of the same line did not appear to be material, so long as it remained unobstructed and capable of being used in that place. The true question was, whether the used railroad was convenient. When it was obstructed, as it might be by the owner of the soil in Amble, and ceased to be passable, it would be no longer convenient for the purposes of the mine, and the part in Hauxley would not be lawfully used (*s*).

The same reservation came again in question at the instance of another landowner in Amble. It was proved that the drift towards Amble was proceeding, and that if unusual impediments had not been encountered, the workmen would have reached and worked Amble coal in six weeks from the period of interruption. It was held by Lord Cranworth, that the liberty of making the railway could only extend to the minerals in Amble, and it would not allow a railway to be laid down in anticipation of coal to be won in Amble, after some other coal should be worked out. There was a right of way during the process of the works for raising the coal in Amble; but if the railway laid down for that purpose was not strictly necessary for some time to come, the defendant was not justified in what he had done. If, on the contrary, the railway was necessary for raising the coal in Amble, and had not been done with a view of raising coal in any other part, and if it had been done in a reasonable time and in a *proper manner*, the defendant would be entitled to a verdict. If the railway was for the purpose of raising the coal in Hauxley, and after that for raising the coal in Amble, or for the purpose of raising the coal in Amble, but if what was done for that purpose was such as to occupy a much longer time than

(*s*) Dand *v.* Kingscote, 6 Mee. & W. 174.

was necessary for raising the coal in Amble, the verdict would be for the plaintiff. A verdict was found for the plaintiff (*t*).

The way-leave reservation of the dean and chapter of Durham over their extensive lands came under discussion in two recent cases (*u*). There were reserved in the surface leases the woods and mines, and powers to win and work the latter, "with free ingress, egress and regress, way-leave and passage to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds," "and also all necessary and convenient ways," and powers "for the purposes aforesaid, and particularly of laying, making and granting waggon-way and waggon-ways in and over the said premises," on payment of compensation. Under this reservation, a railway had in each case been constructed for the general transit of passengers, goods, coals, and merchandize. In the first case, Wallis *v.* Harrison, it was held at the trial by Rolfe, B., that the defendants were justified in making the railway; but it was held in the Exchequer Chamber that the direction was wrong. In the other case, of the Durham and Sunderland Railway, Coltman, J., had, at the trial, told the jury that, if the railway was made for other purposes as well for the carriage of coals and minerals, it was not such a road as was authorized. Tindal, C. J., in giving the judgment of the same court, said the direction was wrong, inasmuch as the railway had not yet been used for the above purposes, and that if the railway was such as might lawfully be made for the authorized purposes, the plaintiff could not yet complain of the intention in other respects. But with respect to the construction of the clause, he said, four different meanings had been suggested: that it left the dean and chapter, first, an unlimited power of granting

(*t*) Smith *v.* Kingscote, Northumberland Summer Assizes, 1840.

(*u*) Wallis *v.* Harrison, 11 L. J., N. S., Exch. 440; Durham and Sunderland Railw. Co. *v.* Walker, ibid.; 2 Q. B. 963. See Brunton *v.* Hall, 1 Q. B. 792.

way-leaves without any restriction; or, second, only a power of that kind for coals and minerals from whatever mines they were got; or, third, only such a power for the transport of minerals from their own lands generally, including amongst others the lands in question; or, fourth, only such a power for getting the minerals excepted in the demise, and that the court was in favour of the last and most limited construction. He said, neither the way-leave to or from the mines in the lands demised, nor that to or from the other lands, were reserved as distinct matters of exception or reservation, but they were mentioned in connexion only with the mines excepted; that so important a right as that claimed would surely have been treated as a separate matter, and it was consistent with the words to suppose that the lessors meant only to reserve a right of getting the excepted minerals by means of pits sunk either in the demised lands or in adjoining lands, [that is, in the latter case, by returning to the lands in question from the pits in other lands.]

A doctrine, rather startling, was propounded in the judgment in this case. It was said, that a right of way could not strictly be made the subject either of exception or reservation. It was neither parcel of the thing granted, which was essential to an exception, nor issued out of the thing granted, which was proper to a reservation; and that it was an easement newly created by way of grant from the grantee or lessee in the same way as a right of sporting or fishing, as in the cases of Doe *d.* Douglas *v.* Lock (*x*), and Wickham *v.* Hawker (*y*), and therefore that it came within the rule that all grants must be construed strictly against the grantor, who was supposed in that instance to be the lessee of the land.

It is submitted, this doctrine, which is both new and dangerous, cannot be maintained. If it can, it must lead to manifest injustice. For, if such a lease is not executed

(*x*) 2 Ad. & Ell. 705. (*y*) 7 M. & W. 63.

by the lessee, it will follow that the right of way will altogether fail, notwithstanding the expressed intention of the lease. The execution of a lease or grant by a lessee or grantee is, in all cases, a very common and proper practice, but by no means universal, or to be presumed, as it was presumed in the above case, particularly since the late enactment by which an estate may be taken by one who is not made a party to the deed (*z*). There is recent authority for this doctrine in the cases cited. It was decided in Wickham *v.* Hawker, that the right of sporting was not a mere personal license, but a profit *à prendre*, within the first section of the Prescription Act. Can it be contended that such a right was not "part of the thing granted," as it existed before the grant? An incorporeal right may be part of the "thing granted" or excepted, whether it be such a profit or not. An excepted right of way, like a license to work mines, or to fell trees, is part of the old dominion of the grantor over the estate. It is not a reservation, in its technical sense, for it does not issue out of the subject of grant in the new condition of rent or services. But it is as much an exception as if it were a tangible part of the property. Before the grant or lease was made, the grantor had *in esse* an unlimited right of way over every part of his land; and the right was not the less part of the proprietorship in being undefined in purpose or direction. The true test is, whether the subject of exception is legally severable from the subject of grant, and not an inseparable incident (*a*). For whatever may be granted in express terms may also be excepted (*b*). Thus, the grant of a manor excepting its services, which exception would destroy the manor, and the grant of a close of meadow excepting *all* the profits of it, would be void for repugnancy. So also the grant or exception of common appendant for all cattle is void. But the grant or exception of common appurtenant for a limited number

(*z*) 8 & 9 Vict. c. 106, s. 5.
(*a*) Shep. Touch. 78.
(*b*) Ibid. 79, Preston's Comment. and 100.

of beasts is good, and part may be granted and part reserved (*c*). Also a grant of the grass or vesture of a meadow, which is but *one* source of profit, is good (*d*). It has even been said, that an exception in a lease *for years* of the profits of a mill during the life of the lessor is good, for the exception is only temporary (*e*). A right of sporting and a right of way are equally capable of grant, and therefore of exception. Such rights, it is submitted, cannot be considered as newly-created rights. They are only old rights in a new form.

In another case, it was enacted by an Inclosure Act, that the Bishop of Durham, as lord of the manor of Lanchester, might hold and work all the mines in the lands to be inclosed, with all convenient ways, and also make any new roads, waggon-ways, or other ways for those purposes, and for winning and working the mines and quarries belonging to the see of Durham, wheresoever situate. It was, of course, held that the bishop was entitled to carry over the inclosed lands as well the minerals of those lands as those from any other mines of the see, but that this right did not extend to the produce of any other mines (*f*).

In another inclosure case, where the lord of the manor was empowered to carry the minerals from the inclosed lands, and also "the coals and produce of any other mines and minerals from or under any other lands and grounds whatsoever," it was held, that the word "produce" included coke, and that the word "other" did not mean, other than mines of coal, but, other than the mines previously mentioned (*g*).

In another case, the lessees of a colliery agreed to grant to the lessees of other mines liberty to use a right of way

(*c*) Drury *v.* Kent, Cro. Jac. 14; W. Jones, 375.

(*d*) Ibid. 79.

(*e*) Ibid.

(*f*) Midgley *v.* Richardson, 14 M. & W. 595; 15 L. J., N. S., Exch. 257.

(*g*) Bowes *v.* Lord Ravensworth, 24 L. J., N. S., C. P. 73.

over a waggon-way, to which they were entitled for the purposes of their own lease. There was no grant by deed; and, in fact, there was no right to make any such grant. But the lessor of the lands, in which the way was, had previously granted by deed a license for a term of years to the latter lessees to use the specified way for the same purposes. The lessor then came into possession of the lands and the way under an assignment or surrender, and he gave notice of his intention to remove the materials of the waggon-way for the purpose of making a new waggon-way for the use of the colliery. But he was restrained by injunction, on the ground that the lessor, having granted a way, and afterwards acquired a power to render that grant effectual, could not be allowed to defeat it (*h*).

The lord of a manor, entitled to the mines, granted a lease for 1,000 years of lands lately inclosed from the common. The mines were reserved, with power for the lessee to work stone for building purposes, and the concluding part of the clause of reservation secured for the lessor free way leave and passage to, from and along the same [mines]. The lessor covenanted to do as little damage to the soil as possible, in working the mines and in leading away the coals, "and in the using the other liberties and privileges excepted and reserved" to the lessor. A similar lease of other adjoining inclosed land was granted by him to another lessee, with the same reservation. It was held, that this reservation did not confine the right of way to the excepted minerals, but that it reserved the absolute right of way for any purpose whatever, and for any unlimited object, including way leave for the minerals of adjoining lands (*i*). Some of the reasons given for this decision do not appear to be satisfactory (*j*).

(*h*) Newmarch *v.* Brandling, 2 Swanst. 99.

(*i*) Proud *v.* Bates, 34 L. J., Ch. 406.

(*j*) See remarks on Bowser *v.* Maclean, chap. II.

A canal act empowered the proprietors of land and their lessees to make railways or roads across the lands of others for conveying coal and limestone to the canal. Fifty-four years after the passing of the act, the lessees of coal mines gave notice of an intention to make a road, under this power, to an adjoining landowner. An agreement was afterwards made, and a small rent was paid under it, but irregularly. The ownership of the land was changed, the road was abandoned, and the lessees, with the consent of the tenant only, made a railroad across the lands in a different direction. But there was an acquiescence by receipt of rent. The agreement was terminable only by notice to be given by the lessees. A subsequent owner of the lands complained of the transit of goods not comprised in the act, and obstructed the railway. On a bill being filed by the lessees, it was held that the landowner was bound by the agreement, which was not affected by the abandonment of one road for another, on account of the acquiescence; that he was liable in damages for the loss sustained by the lessees; and that he must be restrained from further interference (*k*).

Under canal acts giving similar powers, a mineral proprietor is not restricted to the shortest practicable route (*l*).

In a case, where an intended way leave was rendered useless by the defendant not being able to get a lease of a colliery or of ground intervening between it and the river, the court refused to grant specific performance of an agreement (*m*).

When a right of way or any other easement is granted for purposes partly connected with land, and partly for other extraneous purposes, the right to the former only is

(*k*) Mold *v.* Wheatcroft, 27 Beav. 255. 510; 29 L. J., Ch. 11.

(*l*) Richards *v.* Richards, John. 108.

(*m*) —— *v.* White, cited 3 Swanst.

capable of transfer to subsequent purchasers; for a vendor cannot create rights in gross unconnected with land, and annex them to it. These rights will be considered personal only, like common in gross (*n*). A grant or license of this kind, even when given by deed, is revocable on breach of agreement (*o*). If it is not given by deed, it is revocable without cause at any time (*p*). It will be seen afterwards, that a license to work mines, which is a profit *à prendre*, need not be held in union with any dominant tenement, though it must be given by deed.

It may here be stated, that it appears from the case of Arkwright *v.* Gell (*q*), that when a waggon or other way has been used for mining purposes, no right of way will be acquired by private persons or by the public during such user by any lapse of time, as any enjoyment of that kind will not be *as of right*.

It may be useful in this place to notice briefly other general rights of way, which are not directly connected with the grants of mines, but which are often required by mining owners. But it is not intended to enter into any discussion of public ways.

Although almost all these ordinary rights of way are supposed to originate in express grant, they depend, in fact, upon actual user, not only for existence, but for extent of enjoyment.

Rights of way may exist for particular purposes. Thus, a way may be confined to agricultural purposes (*r*), or to the carriage of coals (*s*), or to the passage of all articles except coals (*t*). In a late case, it was held that proof of user for farming purposes did not necessarily prove a right

(*n*) Ackroyd *v.* Smith, 19 L. J., N. S, C. P. 315.

(*o*) Barraclough *v.* Johnson, 8 Ad. & El. 99.

(*p*) Newmarch *v.* Brandling, supra.

(*q*) Infra.

(*r*) Reynolds *v.* Edwards, supra.

(*s*) Iveson *v.* Moore, 3 Raym. 291; 1 Salk. 15.

(*t*) Marquis of Stafford *v.* Coyney, 7 B. & C. 257.

of way for carrying coal from a mine lying under the land of the defendant. Parke, B., said that it was necessary to show an enjoyment of the way generally as of right; that such user, for all purposes for which it was wanted, would be evidence for the jury of a general right; that if the defendant had used the way whenever it was required, it was evidence to show that there was a general right to use it for all purposes; that in that particular case, he thought the user was evidence of a right for all purposes for twenty years; that if the way was confined to a particular purpose the jury should not extend it; but if it was proved to have been used for a variety of purposes, then they might be warranted in finding a way for all (*u*).

It is said by Coke, on the authority of Fleta and Bracton, "There are three kinds of ways; first, a footway, which is called *iter, quod est jus eundi vel ambulandi homini;* and this was the first way. The second is a footway and a horse-way, which is called *actus, ab agendo;* and this vulgarly is called pack and prime-way, because it is both a foot-way, which was the first, or prime-way, and a pack or drift-way also. The third is, *via*, or *aditus*, which contains the other two, and also a cart-way, &c.; for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi*" (*x*).

This convenient threefold distinction, adopted from the civil law, founded on the maxim, *omne majus continet in se minus*, and which is also consistent with sound sense, has been thought to be impaired by some recent decisions (*y*). But there appears to be no ground for that opinion, if the distinction be not insisted on as one of universal application. It may still be considered to be the rule of English law, liable only to be modified by that particular usage,

(*u*) Cowling *v.* Higginson, 4 M. & W. 245. See Higham *v.* Rabbett, 5 Bing. N. C. 622.

(*x*) Co. Litt. 56 a. See Just. Inst., lib. 2, t. 3.

(*y*) Gale on Easements, 201.

under special circumstances, which may direct the precise manner of enjoyment.

In the case of Ballard *v.* Dyson (*z*), the plaintiff's building, formerly a barn, was afterwards used as a slaughter-house for hogs, and then for oxen. The right of way was claimed through a narrow yard or passage, bounded on each side by houses with their doors opening into it. Foot passengers, on meeting carriages, were compelled to retreat into the houses, and were exposed to much danger in meeting horned cattle. The preceding occupier had driven hogs for slaughter, and the plaintiff had been used to drive a cart, the only carriage he had, drawn by a horse, once or twice by an ox. There was no other way to the barn where he kept his cart. He had lately driven fat oxen, but there was no other evidence with respect to cattle. The defendant gave no proof of interruption, or of negative user by horned cattle, and he admitted a right of way for all manner of carriages. It was insisted that this admission necessarily gave a drift-road for all kinds of cattle. Mansfield, C. J., had directed the jury to say whether there was sufficient evidence of a right to drive cattle loose, or whether the grant should be considered as only co-extensive with the user. The jury found a verdict for the defendant, and the Court of Common Pleas refused a new trial. The majority of the judges were plainly of opinion that a carriage-way would not include a drift-way, though it might include a horse-way, and that actual user was in all cases the measure of the right. But the judgment of the dissenting judge, Chambre, is clearly the most in accordance with older authority, convenience, and common sense. He did not contend that a carriage-way necessarily included a drift-way, but that it was *primâ facie* and strong presumptive evidence to that effect. He said, that a person might restrict his grant as he pleased, but the restriction must be proved. He showed in strong terms the absurdity

(*z*) 1 Taunt. 279.

which might follow from a contrary rule, that would exempt some kinds of cattle and include others, and also the danger of confining all rights of way to their actual use.

The true reason for the threefold classification arises from the amount of inconvenience or interference imposed on the servient tenement, and which is supposed to be thus properly measured. *Primâ facie*, it is inconsistent to say that a person may pass with one kind of cattle and not with all kinds; or with carts and not with cattle. Such a conclusion must be considered to be against the presumption of law. But if particular proofs can be given in any case that there existed local or other adequate reasons, either with respect to purpose or mode of enjoyment, for supposing that the grantor meant to confer a restricted right, and if this qualified right has not been exceeded in actual user, then this presumption of law may be repelled. For the maxim, *modus et conventio vincunt legem*, applies equally to actual grants and to rights supposed to be founded on them (*a*).

Section III.

RIGHTS OF WATER.

The waters of brooks and rivers are the gifts of Nature, and the owners of land on their banks are entitled to the enjoyment of them as part of their private domain. Each proprietor has a presumptive right to the land covered with water on his own side, and along his whole front, to the middle of the stream—*ad medium filum aquæ*. But the owner on one side may be shown by the usual evidence to have the exclusive right to the whole of the stream bed. In either case, the owner or owners have a general right to receive the waters in as pure a state as Nature affords them, and such owners are equally bound to transmit them

(*a*) See Inst. (Sandars), lib. 2, t. 3.

to proprietors below without diminution, diversion, or deterioration. For all riparian owners acquire no property in the water itself, but only the privilege of using it in its passage by reasonable interference. For the same reason the waters cannot be forced back upon the owners above, nor so retarded or accelerated as to cause sensible injury to those below. For the law will not regard any small amount of injury, which may be inseparable from due enjoyment by those who have a priority of use.

But, as in other elements of Nature, special rights may exist in the use of water, by the consent of those having the same equality of right, shown either by actual grant or license, or by prescription founded on uninterrupted enjoyment (*b*). But these rights will be strictly guarded within their allowed limits, and any new purpose or use which may sensibly aggravate the previous disturbance cannot be engrafted on any former acquired right; but it must receive its final sanction in the same way as the original right (*c*).

It has been said, that a claim to disturb running water, which is an undoubted easement by prescription, seems to violate the rule of law which forbids one prescription to be pleaded against another; and some difficulty has been suggested in a point of pleading (*d*). But it does not appear to be correct to designate the first right, that to the use of the water, an easement at all, or to say that it is claimed by prescription. The positive right to the use of running water is not a privilege existing in respect of any servient tenement for the benefit of a dominant owner, for it throws no more burthen upon any tenement than that imposed by the law, and that which it exacts itself in like manner from others. The rights may, therefore,

(*b*) See next section.

(*c*) Brown *v.* Best, 1 Wils. 174; Mason *v.* Hill, 3 B. & Ad. 304; 5 B. & Ad. 1; Bracton, lib. 4, 221; Bealey *v.* Shaw, 5 East, 208; Wright *v.* Howard, 1 Sim. & St. 190; Wood *v.* Sutcliffe, 2 Sim. N. S. 163. See Code Nap., art. 640.

(*d*) Aldred's case, 9 Rep. 58 b; Gale on Easements, 129.

rather be considered, like any other incorporeal hereditament incident or annexed to land, as part of the estate itself (*e*). It is true, the water may elude any grasp by the hand of man. But the air is also intangible in any changeless state. Yet the law extends the right of soil, *usque ad cœlum*, and it also gives him a qualified right of property in the wild birds and other game, during the period of their sojourn on his land. There are many instances in which the rights to flowing water are strictly easements, as in the case of artificial channels made for the benefit of an owner through the lands of others. This is as much an easement as a right of way; and it is this kind of water-easement that seems to be specially subject to the recent Prescription Act. The right to the use of the water, as given by Nature, seems to rest upon presumption in the same way as the right to the minerals beneath freehold estates, that is, the presumption is universal and valid till some contrary claim is proved.

It was formerly thought, that a prior appropriation of natural water gave a right over those owners who afterwards sought to turn it to some special use, and, in fact, that a right to water was acquired by occupancy (*f*). But it is now clearly settled, that any appropriation, which injures any other owner, must be established as an easement, and, until so established, may be resisted (*g*). The appropriation, by means of mills or otherwise, is quite valid at any time if the water descends to those below uninjured and continuously (*h*). The riparian right is also subject to a similar reasonable enjoyment by other proprietors (*i*). In the case of Mason *v.* Hill, this appro-

(*e*) Wood *v.* Waud, 3 Exch. 748; 18 L. J., Exch. 305; Nuttall *v.* Bracewell, 36 L. J., Exch. 1.

(*f*) 2 Black. Com. 402; Liggins *v.* Inge, 7 Bing. 682.

(*g*) Bealey *v.* Shaw, 6 East, 208; Saunders *v.* Newman, 1 B. & Ad. 258; Mason *v.* Hill, supra.

(*h*) Miner *v.* Gilmour, 12 Moore, P. C. C. 156.

(*i*) Embrey *v.* Owen, 6 Exch. 353; 20 L. J., Exch. 212; Sampson *v.* Hoddinott, 1 Com. B., N. S. 590; 26 L. J., C. P. 148.

priation is still made to depend in some degree upon prior possession, and some reluctance has been shown in coming to the only plain rule, that injurious appropriation can only be sanctioned by time. Till that period arrives, the appropriator gains no more right than he had before, and he has no less. The dicta of various judges with respect to flowing water being *publici juris*, founded chiefly on the civil law, cannot be wholly supported (*k*). It is quite clear that the Roman law, by which *aqua profluens ad lavandum et potandum unicuique jure naturali concessa* (*l*), gave a universal right which is not recognized by English law, nor by those earlier writers who sought to introduce the civil law into England (*m*). The right to flowing unnavigable streams, according to English law, has no foundation on public rights, except so far as respects the numerous proprietors through whose lands it passes. Even in this large sense, it remains a private right, subject, like any other incorporeal incident to land, to interference and undue disturbance (*n*).

It has also been thought, that an injurious appropriation could not be resisted by any other proprietor, unless he could show that he had sustained some special damage, as there would otherwise be but *injuria sine damno*, and, therefore, no cause of action on the case for a tortious act (*o*). This damage, it was said, could be shown by his having already applied the stream to some useful purpose interfered with by the act of disturbance, or by some subsequent application of it at any time before the first appropriation became established by law (*p*). But as the whole doctrine of appropriation may now be held to be abandoned, and as the riparian proprietor must be considered

(*k*) Embrey *v.* Owen, supra.

(*l*) 2 Inst. tit. 1, s. 1; Vinnius, Comm.

(*m*) Fleta, lib. 3, ch. 1.

(*n*) See Tylor *v.* Wilkinson, 4 Mason's Reports (American), per Justice Story.

(*o*) Williams *v.* Morland, 2 B. & C. 910; Mason *v.* Hill, supra.

(*p*) Bealey *v.* Shaw, and Saunders *v.* Newman, supra.

to hold his right to the use of water as an incident to his estate, it ought also to follow that no positive act on his part is required for preserving his right, except by way of preventing any other proprietor from acquiring a disturbing right by time (*q*). This seems, indeed, to have been the ancient law on this point (*r*). The doctrine of *injuria sine damno*, or *damnum absque injuria*, has been denied by eminent judges, who have maintained with Lord Holt that every injury imports a damage, and that a damage is not merely pecuniary, but that an injury imports a damage where a man is thereby hindered of his right (*s*). It is clear that if water is changed either in quantity or in its good quality, it is so far an injury to an estate as to render it less an object of desire to purchasers and residents, and therefore to lessen its value. It has also been considered in similar cases to be a sufficient ground of action, that such acts of disturbance, if unquestioned, would soon ripen into a right (*t*).

But an injury must not be imaginary. If the water be deprived of the noxious particles produced by previous deterioration, before it reaches the lands of a complainant, there can be no ground for complaint (*u*).

If water be returned in a heated state, a sufficient injury is sustained for an action (*x*).

The right to disturbance may be acquired so as to enable an owner to throw back the water, or to discharge it lower down, or with slower or accelerated current. Thus, a right to discharge water which had been used for the precipitation of minerals and rendered noxious, may be

(*q*) Embrey *v.* Owen, supra; Dickinson *v.* The Grand Junction Canal Company, 21 L. J., N. S., Exch. 241.

(*r*) Palmer *v.* Keblethwaite, 1 Show. 64; Glynne *v.* Nichols, 2 Show. 507, cited in Mason *v.* Hill.

(*s*) Ashby *v.* White, 2 Raym. 955; Williams *v.* Mostyn, 4 M. & W. 153; Gale on Easements, 171.

(*t*) 1 Saunders, by Williams, 346, note; Wood *v.* Waud, supra.

(*u*) Elmhirst *v.* Spencer, 2 Mac. & G. 45; Wood *v.* Waud.

(*x*) Mason *v.* Hill.

gained by user (*y*). The same rule applies to smelting and washing processes.

A right to throw refuse from mines into a natural stream may be asserted either by prescription, or by custom (*z*).

It has been decided in an important case in the Exchequer Chamber, that the law regulating running water does not apply to springs or subterraneous channels (*a*). An action was brought against some coal mine owners for disturbing certain underground springs and watercourses, which supplied his mills. It was proved that the alleged injury proceeded from sinking certain pits. Tindal, C. J., in delivering the judgment of the Court said, that the right to flowing water was public and notorious, but that the water which fed a well flowed through the hidden veins of the earth, so that no man could tell the changes of its sources or the dates of their supply; again, that no proprietor knew what portion was taken from his own soil, how much he gave originally, or how much he transmits only, or how much he receives, and until a well was sunk, whether any springs existed at all. But the difference as to consequences was still more apparent. The owner merely transmits the running stream, receiving as much from above as he sends below. But if an owner who sinks a well could thus acquire an absolute right to the water that collects in it, he could prevent his neighbour from making any use of the spring in his own soil which should interfere with the enjoyment of the well. He had also the power of debarring the owners above from draining their land, and thus, by an act, voluntary on his part, and unsuspected by his neighbour, he might impose on that neighbour a heavy expense, if he had erected machinery for mining, and had discovered, too late, that the water had been appropriated. Further, the relative

(*y*) Wright *v.* Williams, 1 M. & W. 77.

(*z*) Carlyon *v.* Lovering, 1 Hurls. & N. 784; 26 L. J., Exch. 251.

(*a*) Acton *v.* Blundell, 12 M. & W. 324; 13 L. J. (N. S.), Exch. 289.

advantage and detriment might bear no proportion. The well might be sunk to supply a cottage, while the other owner might be prevented from winning minerals of inestimable value—and lastly, there was no limit of space within which the claim of right could be confined—in that case, the nearest coal-pit was half a mile from the well, but the law must equally apply to an interval of many miles.

In the above case, there had been no user for the last twenty years, and the judgment reserved an opinion, if the case had been different. But the tenor of the whole judgment is against the acquisition of any such right, and it concludes by referring the case to the rule that gives to the landowner all that lies beneath, whether it be solid rock or porous ground, or venous earth, or part soil, part water, to be disposed of at his free will and pleasure, without liability for any such inconvenience to his neighbour.

No riparian right can be acquired to water which has not reached a regular natural channel, either as a main stream, or a tributary, or feeder, and which merely overflows the land, or percolates through it in a casual manner (*b*).

When a spring has risen to the surface, and has begun to run in a natural channel, any diversion is wrongful (*c*). A channel may exist in a state sufficiently defined underneath the surface, as in long caverns (*d*).

A lessee of mines, with a general right to use surface water, cannot claim the water of a stream flowing along the boundary of the lands as a proprietory right (*e*).

A distinction has been made between a pollution and

(*b*) Broadbent *v.* Ramsbotham, 11 Exch. Rep. 602; 25 L. J., Exch. 115; Chasemore *v.* Richards, 2 Hurl. & N. 168; 26 L. J., Exch. 392; affirmed House of Lords, 7 H. L. Ca. 349; 29 L. J., Exch. 81. See also, The New River Company *v.* Johnson, 29 L. J., M. C. 93; The Queen *v.* The Metropolitan Board of Works, 32 L. J., Q. B. 105.

(*c*) Dudden *v.* The Guardians of Clutton Union, 26 L. J., Exch. 146.

(*d*) Hodgkinson *v.* Ennor, infra; Ennor *v.* Barwell, 2 Giff. 410.

(*e*) Insole *v.* James, 1 Hurl. & N. 243.

an abstraction of water. A millowner, at the foot of the Mendip Hills, had enjoyed a clear right to the use of water for the use of his mill. The water arose from the rainfall on the hills, and flowed by subterraneous passages into a cavern, where it flowed in a defined stream, and in that state issued, in great abundance, into an open natural basin at the foot of the rocks. It then flowed onwards into an open regular stream through the land of the millowner. The mill was used for the manufacture of paper, for which purpose pure water is required. The defendant was the occupier of land on the summit of the hills, called the "Priddy Minery." The surface soil there was artificial, to the depth of several feet, and contained minute particles of lead, and also lead slags. This soil had been brought from a distance and deposited there, a long time ago, for the purpose of having the lead ore extracted from it by the water power existing there, and smelted. These slags had been smelted there at intervals, by successive proprietors; but, till the year 1857, when the defendant became the occupier, no process had been used for extracting the minute particles of lead. In 1858, he established buddles, or circular pits on the surface, with a framework which retained the water. The effect of his process was, that, after the ore had been retained, the refuse soil and water, which still contained small portions of lead ore, was discharged from the pits in muddy streams into drains, which communicated with "swallets." These are round funnel-shaped holes occasioned by the subsidence of the limestone strata, with outlets at the bottom for water to pass through into the passages, which helped to supply the stream in the cavern. It was found, in the special case submitted to the court, that the water had been thus polluted and made unfit for the use of the mill. The defendant failed in asserting any right by prescription. It was held, that the case was not within that of Chasemore *v.* Richards; that the defendant had a right to use the water on his land for washing his lead, but that

he was bound so to use it as not to injure his neighbour, and that the millowner had a good cause of action (*f*).

If this judgment be correct, and be strictly applied, it would follow, that a mine-owner, in the proper exercise of his rights, might, in some cases, withdraw the whole of the water arising from springs, but that he could not disturb it by pollution. In the case cited there were other sources of supply which were affected by the works, besides those that were directly fouled.

When the rights of claimants are regulated by actual agreement, or by deed, any implied or natural rights will be excluded. Thus, a lessor had demised by deed certain closes, which formed part of his estate, and which were used for bleaching works, and all streams of water which might be found in the closes, with a reservation of all mines, and all streams of water, "except those above granted," then being or thereafter to be found in the lands demised. The lessor afterwards demised the mines, and the mine-lessee diverted the waters, which were derived from natural springs. It was held, that the first lease conveyed the whole of the water in the closes, and that the reservation of the streams applied to waters in other lands, and did not authorize the mine-lessee to cause any disturbance of the water in the closes (*g*).

We now come to consider the law relating to artificial streams or watercourses, a subject of much greater nicety, and still more connected with the subject of this treatise. In mining operations, it is always necessary to keep the works free from water, and often to acquire a large supply of water for general purposes. In effecting these objects, many natural springs and streams are often directed or accumulated into one channel, or are otherwise so diverted

(*f*) Hodgkinson *v.* Ennor, 32 L. J., Q. B. 231. See Race v. Ward, 7 E. & B. 384; 26 L. J., Q. B. 133.

(*g*) Whitehead *v.* Parks, 2 Hurl. & N. 870; 27 L. J., Exch. 169. See also Lee *v.* Stevenson, 27 L. J., Q. B. 263; E. B. & E. 512.

or disturbed as very much to affect the interests of adjoining landowners. As the law relating to this subject has been much misunderstood, and as its application is likely to become of frequent occurrence, and of great importance, it is the more requisite that it should rest upon some sound and intelligible principle, for which the previous discussion will have much prepared the way.

The right of drawing, discharging, or otherwise conducting water from its natural bed, over the lands of others, by artificial channels, is strictly an easement, as already mentioned, and, like others, may be acquired by express grant or sufficient uninterrupted user. When the mines form a separate inheritance, they are, of course, capable of attracting and imparting these rights, in the same way as any other tenements. For the servient owner, in suffering an encroachment, may also have gained a profit, so as to become in his turn the owner of an easement, in having the right to the continued flow of water for his own benefit. The existence of this latter right will depend mainly on the purpose of the diversion or disturbance, and on the duration of that purpose.

In a case in the Exchequer, an action was brought to recover damages for the diversion of a portion of water flowing to the plaintiff's cotton mills, down a mineral sough or level called the Cromford Sough. It appeared, this sough was made previous to the year 1704, and was used for draining the lead mines in the district of the wapentake of Wirksworth, in Derbyshire. The water from the level discharged itself into a stream called Bonsall Brook, and formed a junction with it. The sough was repaired and maintained by a company, who were entitled under a deed of settlement to certain contributions or composition from various owners of mines in the vicinity, under whose sanction and licenses the work was constructed. In 1738, the owners of the sough and composition ore granted a lease of them for ninety-nine years, subject to the condition to keep the sough in good repair. In 1771, Sir Richard Arkwright, the father of the plain-

tiff, obtained a lease for eighty-four years, from the owner of the land through which the sough was made, of the brook, of the water issuing from the sough, and of a piece of land below the junction of the waters, where there was an ancient corn mill, with the right of erecting mills upon it. In 1772, he accordingly erected extensive cotton mills, partly on the site of the ancient corn mill, which were worked by the united streams. It was stipulated in the lease that if the stream issuing from the Cromford Sough should, by bringing up any other sough, or by unavoidable accident, be taken away or lessened, so that there should not come sufficient water to work the mills, it should be lawful for the lessee to take down the mills, and remove to another piece of ground. In 1789, the lessee purchased the absolute interest in the land demised, and in so much of that through which the sough was laid as was within the manor of Cromford. In the meantime another company had commenced another slough, called the Meer Brook Sough, on a lower level, for draining a larger portion of the mineral field, under a similar license from the same mine owners who used the Cromford Sough. In 1836, the latter sough was drained, and the water supplying the mills was diverted. It was held by the Court, that the plaintiff had not acquired such a right to the water as to entitle him to maintain an action against the proprietors of the Meer Brook Sough. Lord Abinger, who delivered the judgment of the Court, said, the watercourse was artificial, made for a definite object, and the flow of water through it was of a temporary character, depending upon its being required for the convenience of the miners. Sir Richard Arkwright had contemplated, in 1771, the discontinuance of the water by the proviso in his lease. The plaintiff could only have a right to use the water for any purpose to which it was applicable, so long as it continued there. A user for twenty years, or longer, would afford no presumption of a grant of the right to the water in perpetuity; for such a grant would oblige the

mine owner not to work his mines by the ordinary mode of getting minerals, below the level drained by the sough, and to keep the mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose. How could it be supposed that the mine owners could have meant to burthen themselves with such a servitude, so destructive to their interests? If a steam engine were used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of the adjoining landowner, and is there used for agricultural purposes for twenty years, is it possible, from such a user, to presume a grant by the owner of the steam engine of the right to the water in perpetuity, so as to burthen himself and the assigns of his mine with the obligation to keep a steam engine for ever for the benefit of the landowner? Clearly not. The nature of such a case distinctly showed that no right is acquired as against the owner of the property from which the course of water takes its origin; though, as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired. But a user for a much longer period than twenty years, whilst the flow of water was going on for the convenience of the mines, would afford no presumption of a grant at common law as against the owners of the mines.

It was also observed, that the recent statute (*h*) gave the plaintiff no such right. The whole purview of the act showed, that it applied only to such rights as would before the act have been acquired by the presumption of a grant, from long user. The act expressly requires enjoyment for different periods "without interruption," and therefore necessarily imports such a user as could be *interrupted* by some one "capable of resisting the claim," and it also requires it to be "of right." But the use of the water in this case could not be the subject of an action, at the suit of the proprietors of the mineral field lying below the

(*h*) 2 & 3 Will. 4, c. 71.

level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period, by any reasonable mode; and as against them it was not *of right;* they had no interest to prevent it, and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it (*i*).

But if the original purpose of diversion or discharge is exhausted or abandoned, these rights may be materially altered, for then the enjoyment may become for the first time "as of right," and liable to be ripened by time into an absolute right.

In another case, an action was brought against some mining adventurers in Cornwall for disturbing and making foul a stream which was used for the purposes of a brewery. The water had issued in a pure state from the mouth of an abandoned adit or level, which had been made at an unknown and remote period, and passed into a distinct watercourse over the surface of a field of which the plaintiff had, in 1802, acquired the possession under a lease. The field was drained, and the stream was diverted into a brewhouse, and from thence back again into the watercourse; and there had been a continued and uninterrupted use and appropriation for thirty-six years. The defendants had lately begun to work the ancient mine in an adjoining field, and by turning the water of this mine into the old adit, they had rendered the water foul and of no use to the plaintiffs. At the trial, Mr. Justice Patteson directed the jury to consider whether a custom alleged to exist in Cornwall, and which authorized mine owners to resume the use of an adit after an abandonment of twenty years, had been proved by the evidence,

(*i*) Arkwright *v.* Gell, 5 M. & W. 203. See Wood *v.* Waud, supra. See also The Staffordshire and Worcestershire Canal Navigation Co. *v.* The Birmingham Canal Navigation Co., 35 L. J., Ch. 757.

and whether those who use water under such circumstances use it subject to such a custom; and that, in the absence of custom, a person using an artificial stream for twenty years acquired the same right as in the case of a natural stream. The jury did not find such a custom, and gave a verdict for the plaintiffs. On a motion for a new trial, Lord Denman, in giving the judgment of the Court, said, it had been contended, that the artificial nature of the adit, and the known practice of all the mineral districts, were strong evidence, even in the absence of a custom, to show that the plaintiffs' enjoyment was not of right, because they must have known that the owner of the mine had made the watercourse for his own convenience, and had ceased to work it with the intention of resuming that work whenever it suited his interest, and with all the rights of throwing in dirt and rubbish which usually attend these operations, and that the universal mode of proceeding in the mining district would have been material to show, that the plaintiffs took the water with no idea of having a right to it, but were merely taking advantage of the non-user of the adit for such time as it happened to be useful to them. The Court was not prepared to say, that the circumstances under which a watercourse had been enjoyed might not prove it to have been without right, or that a universal practice of the neighbourhood might not tend to fix the party with the knowledge that those who cleared a mine by an adit notoriously reserved to themselves the right of working the mine at any time; but this view had not been pressed at the trial, the defendants relying on the custom. The imputed misdirection was, that the law of watercourses is the same, whether natural or artificial. They thought this was clearly right. The contrary proposition, that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be so enjoyed as to confer a right to use the water, if proved to have been

originally an artificial stream, seemed quite indefensible (*k*).

If the remarks before made, with respect to ownership of water, are correct, the opinion of the Court that there is no difference in acquiring rights to natural and to artificial watercourses, cannot be supported (*l*). But this does not affect the decision itself, which was meant to rest on the ground that an adverse right *may* begin from the time of abandonment—and that user, if of right, may give a right to the water of an artificial stream. In the absence of special custom, which can only exist in districts subject to peculiar mining laws, a mine owner has no right of accumulating and discharging water into unusual channels. But he may acquire this right by user over all the lands through which the new water flows. If this right is acquired, or acquiesced in before full acquisition, the derivative rights of the landowners cannot properly begin till their enjoyment becomes *of right*. It has been seen, that it was decided in Arkwright *v.* Gell, that as long as the mining purpose endured, such an enjoyment could not be presumed. When that purpose is merely suspended for a time, it is also clear that the right can still have no beginning. The question is, whether such a right may begin after abandonment. But it may be asked if there can ever be said, in this sense, to be an abandonment of mines by their owners, except when the minerals are wholly exhausted. If this entire exhaustion has not taken place, it may well be said that any enjoyment of water, under such circumstances, must be *precarious*, and, therefore, not of right. For it is very common to resume mining operations, both in metallic and in stratified mines, after intervals of long or short repose. But if the mine owners, by their own conduct or by sufficient parol com-

(*k*) Magor *v.* Chadwick, 11 Ad. & E. 571. See Brown *v.* Best, 1 Wils. 174.

(*l*) See Greatrex *v.* Hayward, 8 Exch. 291; 22 L. J., Exch. 137; Gaved *v.* Martyn, 34 L. J., C. P. 364; 19 C. B. 732.

munication (*m*), manifest a clear intention to surrender the right, so as to induce the belief that the stream is given again to the domain of nature without any word of revocation, then the enjoyment of the landowners below will begin to be *of right*. For it is then no longer subservient to an overt or an anticipated purpose, which may prevent any concurrent hostile rights. It was suggested, in Magor *v.* Chadwick, that notice by the mine owners, that the rights of the claimants would be liable to interference and interruption, might sufficiently rebut this presumption. In cases of doubt, such a notice may be proper—and it might even be prudent, to defeat any claim of that kind, by insisting on the acceptance of a consent or agreement in writing under the Prescription Act, or by some actual and effectual interruption. But, in the absence of positive acts or speech on the part of the mine owners, such precautions do not appear to be indispensable.

It has since been expressly decided, that if an artificial stream has been used and enjoyed in such a manner and for such a time as would give adverse riparian rights in the case of a natural stream, the same rights may be acquired in the artificial stream (*n*).

The distinction between natural and artificial streams has been further explained in a recent case. A stream of water had been brought to the surface artificially by mining operations, and had been used in certain clay works. During the first period of user, the mine owner had worked for tin, and had exercised his right to the water. Payments had also been made to the tin-founder for his desisting from exercising his right to foul the stream. Afterwards, another occupier of the clay works had enjoyed the water without any interruption for more than twenty years. It was held, that the mine owner had not abandoned his right to disturb the water, and that no

(*m*) See next section.

(*n*) Sutcliffe *v.* Booth, 32 L. J., Q. B. 136.

adverse right had been established against him. It was observed by Erle, C. J., in delivering the judgment of the Court, that the rights and liabilities entirely differed with respect to natural and artificial streams. The water in an artificial stream, flowing in the land of the person who originates it, is his own property; but, if made to flow in the land of another owner without his consent, a wrong is done to him. If there is uninterrupted user of that land, as of right, for twenty years, such user is evidence of an easement against the owner; but it is of itself alone no evidence that the water must be continued, either by the owner above, or suffered by the owner below. There may be facts leading to a presumption that the stream was originally intended to have a permanent flow, or that there was a permanent abandonment of the mining works which caused the supply, without the intention to resume them—and thus the stream may become subject to the law relating to natural streams. But, in that case, there was no dominant *actio* on the one side, nor servient *patientia* on the other—neither presumption of grant, nor evidence of right (*o*).

If the acquired right of mine owners has only consisted in polluting an ancient stream, this right, if surrendered in the way above described, will cease at once, and the rights of the landowners will, of course, also be immediately restored.

With respect to the landowners, as among themselves, their rights to an artificial stream, after the right of discharge is complete, and even before that event in case of their acquiescence, seem to depend entirely upon prior appropriation, except that no such owner can aggravate any injury so as to burthen his neighbour with a new easement. Within this limit there will be a title by occupancy, which will in time become subject to the matured rights of others.

(*o*) Gaved *v.* Martyn, 19 C. B. 732; 34 L. J., C. P. 353.

In another case, an artificial channel had been cut through a close at a remote period, by which the water of a brook was diverted for its irrigation. The occupiers of an adjoining close had, from time immemorial and without interference, been accustomed in the summer to go on the first close, and place sods in the brook and in the artificial channel, so as to divert the water down the channel into a pit on the latter close, where it was used for watering cattle. In an action brought for disturbing the latter right, it was held, that the continued enjoyment and the acts, which would have been wrongful, if no easement had existed, were evidence of the right to the water, and that the artificial character of the watercourse did not prevent the acquisition of the right, as there was no evidence of a mere temporary purpose (*p*).

A person cannot recover damages for an injury to water, when he himself can set up no sufficient right to its use against a wrongdoer. Thus, a plaintiff had been allowed by the owners of a canal to insert in it a pipe for conveying the water to a cistern, and thence to his boilers for the steam engines connected with his mines. The defendant had fouled the water by a drain leading from his chemical works on the other side of the canal, whereby the water flowing by the pipe was injured. It was held by the Court of Exchequer that the defendant could not resist an action by a plea of not guilty, nor by denying an averment in the declaration, that the water ought of right to flow in the canal without pollution. The averment was not to be construed as asserting a right on the part of the plaintiff, but as negativing the right of the defendant to injure the water (*q*). But this judgment was reversed in the Exchequer Chamber by a majority of the judges there (*r*).

A liberty of making a sough or water-level for a defi-

(*p*) Beeston *v.* Weate, 5 E. & B. 986; 25 L. J., Q. B. 115.

(*q*) Whaley *v.* Laing, 26 L. J., Exch. 327.

(*r*) 27 L. J., Exch. 422; nom. Laing *v.* Whaley, 3 Hurl. & N. 675.

nite purpose will imply an incident right to enter and keep it in repair, as long as the purpose supposed to be contemplated by the parties shall demand its being used, and will authorize all other proper acts for the accomplishment and continuance of that purpose, although some of those acts only may have been specified by express agreement.

The plaintiff, in the case above alluded to, was seised of a piece of woody ground, and the defendant was seised also of another piece of woody ground adjoining, and of thirty-five acres of land also adjoining. The defendant claimed the exercise of certain liberties for working the coal under his lands under a former grant. It appeared a former owner of the plaintiff's land had granted to a former owner of the defendant's lands, his heirs and assigns, full liberty to carry up a sough or level from the place in question into the piece of woody ground of the defendant, and also to make two little sough pits, at specified points in the plaintiff's land, for the more easy and safe carrying up the tail of the sough. One of the pits was to be covered as soon as conveniently, and the other to be kept open for examining the sough so long as was necessary and no longer, and also for bringing the rubbish which might arise in another sough pit intended to be made in the other piece of woody ground belonging to the defendant, and throwing it into a hollow place in the ground in question for improving a cartway intended to be made to the *intended colliery*. These works were completed; the defendant had kept the sough in good repair, and the two pits, being afterwards considered unnecessary, had been filled up. But after another period the defendant had entered the lands again, sunk a pit and opened a level. For this an action of trespass was brought, and it was contended for the plaintiff, that the liberty of opening sough pits was only intended to be granted once, so long as the drain then made would serve the purpose, but not to be renewed by making fresh pits after the first were closed; and that the grant of the sough was to be

confined to the liberty of getting coals from the defendant's woody ground only. But it was observed by Lord Ellenborough, who delivered the judgment of the Court of King's Bench, that, though the deed did not distinctly point out what particular purpose the drain was intended to answer, it seemed the object of the grant was to drain the water from an *intended* colliery, the local extent of which there were no means of defining; but, judging from the nature of such works, there seemed no reason to give them any narrower limit than the boundaries of the continued property of the grantee, under which the intended colliery might be prosecuted by him, without regard to the pieces of ground under which it might be carried, and who might, of course, be expected to follow the coal through all the contiguous and connected seams of coal which belonged to him. The question, therefore, was singly, whether the grantee had a right to do what from time to time might be wanted to repair the sough, so long as the original purpose required it to be continued, or whether, the sough having been once made, it was the intention of the parties that the grantee should use it no longer than it should happen to continue unimpaired by length of time or accidents, although the grantee might have actually lost the beneficial use of it after it was made. The latter construction would ill accord with the views of one who was about to open a colliery intended to be worked as long as the coal might last. The liberty of making two little sough pits did not furnish any substantial inference against the defendant. The purpose of *that* liberty was for the more easy and safe carrying up the tail of the sough. That purpose was answered, and it might reasonably be concluded that the sough might have been carried up, though not so easily and safely, without the pits, and if so, the grantee, under the words merely granting him the liberty to make the sough, would not have been entitled to make pits of that description. If the sough had been to drain the water from all the grantee's coals, he would have had a right to maintain the sough while

there were any coals; and if that were so, as all the coals were not gotten from the defendant's woody grounds and the adjoining lands, which might be deemed the *intended colliery*, the right to maintain the sough would of course continue (*s*).

The burthen of repair falls on the owner entitled to the easement (*t*). He is also liable, in the case of any artificial work required for the enjoyment of the right, for any damage arising from the want of repair, but not for any injury arising from natural causes to natural easements (*u*). The duty of repair can only be thrown upon the servient tenement by special imposition. As in the case of a public highway or a bridge to be repaired by a proprietor *ratione tenuræ*, or by prescription, contrary to the presumption of law, great strictness of proof will be required. But it is quite competent for owners to make special stipulations by deed, which may impose this burthen on the servient tenement (*x*). The same effect may be produced by implied covenants; and the same prescription, which gives its right by actual enjoyment, may also in a similar way impose the additional burthen of repair (*y*).

The owner of the right, with the burthen of repair, has, of course, all the necessary rights of entry and interference which are necessary for the full enjoyment of the easement (*z*). When he is thus bound to repair a road, he cannot trespass by leaving the ordinary track for want of repair, as in public highways (*a*). If he neglect to repair any artificial work, so as to occasion a private nuisance,

(*s*) Hodgson *v.* Field, 7 East, 613; 3 Smith, 538.

(*t*) Bract. lib. 4, fo. 222; Pomfret *v.* Ricroft, 1 Saund. 322 a; Taylor *v.* Whitehead, 2 Doug. 745.

(*u*) Com. Dig. Chimin.

(*x*) 2 Inst. 701.

(*y*) Spencer's case, 5 Rep. 16; Rider *v.* Smith, 3 T. R. 766; Mayor of Congleton *v.* Pattison, 10 East, 135; Easterby *v.* Sampson, 9 B. & C. 505; 1 Cr. & J. 105; Taylor *v.* Whitehead, and Pomfret *v.* Ricroft, supra.

(*z*) Rep. 9 Edw. 4, 35; Pomfret *v.* Ricroft, supra; Liford's case, 11 Rep. 52 a. See Code Nap. art. 697.

(*a*) Ballard *v.* Harrison, 4 M. & S. 387, overruling 2 Black. Com. 36; Gale on Easements, 322.

the owner of the land may either bring an action or abate the nuisance by prostration or by repairs (*b*).

By 13 Geo. II. c. 21, treble damages may be recovered against any person wilfully and maliciously diverting water into any *coal*-work, mine, pit, or delph of *coal*, or into any subterraneous passages, with intent to damage such property or destroying or obstructing any sough or sewer enjoyed in common for fifty years and made for draining mines of coal. But the act does not apply to the owner of any such sough or sewer.

Section IV.

THE PRESCRIPTION ACT.

Rights of way and water, like all other incorporeal hereditaments, can only be expressly granted by instruments under seal. But they were capable at common law of a *quasi* possession, which consisted in enjoyment. Thus arose the title by prescription.

It was necessary that this enjoyment, as in the civil law, should be long, peaceable, open and "as of right"—*longus usus, nec per vim, nec clam, nec precario* (*c*). The main difficulty afterwards lay in measuring the length of time. For this purpose reference was naturally made to the memory of man, or to the "time whereof the memory of man runneth not to the contrary." Unfortunately this memory, as defined by the law, far outstretched that of any living evidence. Time of memory, in conformity with a statute for fixing a date for alleging seisin in a real action was held to begin from the year 1189; and when that statute was altered, so as to fix a certain number of years for real actions, the courts of law, if not at first,

(*b*) Bract. lib. 4, fo. 230. (*c*) Bract. lib. 2, 51; Co. Litt. 113 b.

at least afterwards, were unaccountably supposed, in prescriptive cases, still to leave open an ear for all testimony up to that period, which became daily more remote. The same course seems to have been followed when the later Statutes of Limitation were passed. This inconvenience led to the well-known expedient of a lost modern grant (*d*). Although the grant was entirely feigned, the jury was supposed to believe in its former actual existence; but if the direction of the judge to this effect was disregarded, a new trial could be obtained (*e*). It was thus established in practice, that a right could not be defeated by giving proof of its non-existence at a period ever so shortly before the time when the presumptive period began (*f*). The chief object of the Prescription Act, 2 & 3 Will. 4, c. 71, was to dispense with the intervention of a jury, and to make the finding of the lost grant a rule of law (*g*).

Much difficulty has occurred in the construction of this act, and it is very important to consider to what extent it alters the old law relating to the rights now under discussion. But it has not superseded the common law, and a claimant may, it seems, proceed either under the statute or as before the act was passed (*h*).

The act begins with a preamble reciting that the expression "*time immemorial*" is considered to include and denote the whole period from the reign of King Richard I., whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment.

The second section enacts, that no claim to any way or other easement, or to any watercourse, or the use of any water, when such way or other matter shall have been

(*d*) See Gale on Easements, 92; Dig. 8, 5, 10; Inst. lib. 2, t. 3.

(*e*) Jenkins *v.* Harvey, 1 Cr. M. & R. 894.

(*f*) Campbell *v.* Wilson, 3 East, 224; Mayor of Hull *v.* Horner, Cowp. 102; Doe *d.* Fenwick *v.* Reed, 5 B. & A. 232; Codling *v.* Johnson, 9 B. & C. 933; Penwarden *v.* Ching, 1 Moo. & M. 400.

(*g*) Bright *v.* Walker, 1 Cr. M. & R. 217.

(*h*) See Onley *v.* Gardiner, 4 M. & W. 496.

actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated by showing only that such way or other matter was first enjoyed at any time prior to such period; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter shall have been so enjoyed for the full period of forty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

By the fourth section, each of the periods shall be that *next before some suit or action* wherein the claim shall be brought into question; and no act or other matter shall be deemed to be an interruption, unless the same shall be submitted to or acquiesced in for one year after the party interrupted shall have notice thereof, and of the person making or authorizing the same to be made.

It is provided, that in all actions and other pleadings it shall be sufficient to allege the enjoyment *as of right* by the occupiers of the tenement in respect whereof the claim is made, without claiming in the name or right of the owner of the fee. But no presumption shall be allowed in respect of any less period of years than that applicable to each case under the act (*i*).

The time during which any person otherwise capable of resisting any claim shall be an infant, idiot, non compos mentis, feme covert, *or tenant for life*, or during which any action or suit shall have been pending, and shall have been diligently prosecuted, shall be included in the computation of the periods, except in cases where the right or claim is by the act declared to be absolute and indefeasible.

When any land or water, subject to any way or other *easement* (*j*), has been held under any term of life, or any

(*i*) Sect. 5. See Ivimey *v.* Stocker, 34 L. J., Chanc. 640.

(*j*) See 1 Mee. & W. 77.

term of more than three years from the granting thereof, the term of enjoyment during the continuance of such term shall be included in the computation of the period of forty years, in case the claim shall, within three years after the end or sooner determination of such term, be resisted by any person entitled to the reversion. But no allowance is made for disabilities in computing this period, as in the shorter period.

Thus, the rights now mainly in question, rights of way and water, cannot be defeated after twenty years' enjoyment by merely showing their origin prior to that period, but in any other way by which they could before have been defeated; that is, by proof of grant or license, written or parol, for a certain period, or of the absence or ignorance of the parties affected. But where there has been enjoyment for forty years, the rights are absolute, unless there has been consent in writing.

The statute does not recognize different classes of rights, qualified and absolute, valid as to some, and invalid as to others. An enjoyment of twenty years, therefore, gives no title at all, if it does not bind all. Thus, such an enjoyment against a tenant for life or for years of church lands will not affect him, as it cannot affect the reversion of a bishop (*k*).

The words, "as of right," do not mean an adverse right, but an open and uninterrupted enjoyment. The preceding words of the act are, "claiming right thereto without interruption."

Where the right is declared to be indefeasible, the time of any tenancy for life, and of the term exceeding three years, are not computed in the period of forty years; but the latter period opens and shuts, according to circumstances, till the full number of years is completed (*l*). But

(*k*) Bright *v.* Walker, 1 Cr. M. & R. 220.

(*l*) Bright *v.* Walker, supra; Clayton *v.* Corby, 2 Ad. & E., N. S. 813; Pye *v.* Mumford, 11 Ad. & E., N. S. 666.

the claim must be resisted within three years from the end of any such tenancy or term.

In all cases of prescription want of title to the right may arise from concealment, either in the privacy of its exercise, as by using a road by right, or by the nature of the right itself, as in unseen excavations of soil (*m*).

Unity of possession is also insufficient to raise any acknowledgment of right, for such a claimant enjoys, not the easement, but the soil itself (*n*); and unity destroys the effect of any previous user by breaking the continuity (*o*).

There may be an intermission of right, as in rights of way; but there must be no effectual interruption (*p*). The continuity of the enjoyment depends on the nature of the right, but in no case must it be broken by any adverse conduct on the part either of the claimant or the landowner (*q*). Thus, express accepted parol permission from the latter destroys the chain of evidence of right (*r*). But the mere non-user of a right of way on account of a more convenient temporary access, will not amount to abandonment (*s*).

Before the statute, any admission, written or unwritten, was sufficient to repel a right, however long it had been enjoyed. But the statute only permits a parol license to be effectual with respect to the first period of twenty years. When the enjoyment has continued for forty years, the right can in this respect only be rebutted by proof of its enjoyment by express consent in writing.

The enjoyment must be proved for the whole period, and

(*m*) See Chap. XI.

(*n*) Bright *v.* Walker, 1 Cr. M. & R. 211.

(*o*) Onley *v.* Gardiner, 4 M. & W. 496.

(*p*) Carr *v.* Foster, 3 Ad. & E., N. S. 581; Hall *v.* Swift, 3 Bing. N. C. 381.

(*q*) Tickle *v.* Brown, 4 Ad. & E. 383; Beesley *v.* Clark, 2 Bing. N. C. 705.

(*r*) Monmouthshire Canal Co. *v.* Hereford, 1 Cr. M. & R. 614.

(*s*) Ward *v.* Ward, 7 Exch. 838; 21 L. J., Exch. 334.

the period is entire, and defined by reference to suit or action (*t*). It is not sufficient to prove for a full period of twenty years, if the last four or five years are not favourable (*u*). But an authorized deviation of way for a part of the time will not affect the right (*x*).

The first section of the act, which relates to *profits à prendre*, applies only to cases of claim within the lands of another, and not to copyholders claiming rights within their own tenements according to the custom of the manor (*y*).

The payment of rent does not amount to *interruption*. There must be an actual discontinuance of the enjoyment by reason of some substantial obstruction. Where there has been actual enjoyment there can have been no such interruption. But such a payment may be tendered as proof of a parol licence, when that would be available (*z*).

An interruption, under the statute, in order to be effectual, must be acquiesced in for one year (*a*). But it may be made at any time before the period expires. Thus, an enjoyment for nineteen years, and a small part of another year, may establish a right, if an action is brought before the interruption has lasted one whole year (*b*).

Although the interruption must be submitted to for a year to repel a right, yet evidence of an interruption for a shorter period may be given, to show that the enjoyment never was *of right*, and therefore required no disturbance for the longer period (*c*).

A right to water had been enjoyed for twenty years without interruption, and apparently against all the world,

(*t*) Bailey *v.* Appleyard, 8 Ad. & E., N. S. 167; Wright *v.* Williams, 1 M. & W. 77; Flight *v.* Thomas, 8 Cl. & Fin. 242; Lowe *v.* Carpenter, 20 L. J, N. S., Exch. 374.

(*u*) Payne *v.* Shedden, 1 Moo. & R. 382; 3 Ad. & E., N. S. 585.

(*x*) Reg. *v.* Chorley, 12 Ad. & E., N. S. 515.

(*y*) Hanmer *v.* Chance, 34 L. J., Chanc. 413.

(*z*) Plasterers' Company *v.* Parish Clerks' Company, 20 L. J., N. S., Exch. 362.

(*a*) See also Code Nap. art. 2243.

(*b*) Flight *v.* Thomas, 8 Cl. & Fin. 242; Parker *v.* Mitchell, 11 Ad. & E. 788.

(*c*) Eaton *v.* Swansea Waterworks Company, 20 L. J., Q. B. 482; 17 Q. B. 267.

but in continuation of the right of a predecessor, which began and was liable to be determined by agreement. The jury found there was sufficient evidence to connect the subsequent enjoyment with the previous agreement, and therefore that the user was precarious and not of right. The Court refused to disturb the verdict (*d*).

When there is a long line of watercourse, the right to which exists only by revocable license, an aggrieved owner cannot, except on his own land, obstruct it at any point he chooses to select, but he may, by consent of other owners, abate the cause of injury with due reference to the convenience of the owner on whose land he enters for that purpose, whose convenience is superior to that of any other persons affected. He must at the same time commit no unnecessary injury to the owners of the watercourse (*e*).

In the case just cited the plaintiffs were lessees of the "Bank Colliery." Having found their workings obstructed by water, they were allowed by the owner of adjoining lands and of a colliery, then unworked, called the Broadwater colliery, to make and use a watercourse over that colliery and the farm in which it was situate to carry off the water pumped up from the Bank colliery. The farmer assented to this, and used some of the water for making bricks. The main water flowed along the new watercourse over the brickyard, and into a pit in the old workings of the Broadwater colliery. The defendant became the lessee of that colliery, and the plaintiffs were required by the lessors to extend the watercourse, so as to join an old watercourse of the Broadwater colliery, which conveyed the water of that colliery into a canal basin. The defendant had power under his lease to occupy part of the surface, to make use of watercourses, and to occupy such other parts of the land as might be necessary. He had assented to the continuance and extension of the watercourse. But, as some of the

(*d*) Gaved *v.* Martyn, 19 C. B. 732; 34 L. J., C. P. 353.

(*e*) Roberts *v.* Rose, 33 L. J., Exch. 1, 241; 35 Ibid. 62 (appeal); 1 Law Rep., Exch. 82.

water escaped from it into his workings, he withdrew his assent by notice. The plaintiffs having paid no regard to the notice, the defendant stopped up the watercourse at a point on the land occupied by the farmer. The effect was, that the water pumped up by the plaintiffs was penned back and thrown over the surface of their colliery, and then percolated back into their mine and damaged their workings. It was held, that the defendant had the power to revoke the licence, and had so revoked it. The plaintiffs offered evidence to show that the watercourse might have been stopped lower down with less damage to themselves, and in a more reasonable manner. But it was also held, that, as it had been proved that the farmer would have been more seriously injured by that act, the plaintiffs had no right of action (*f*).

It has been decided that an easement in gross is not within the act (*g*).

All rights of way and water, and other easements, may be released by deed, or by any decisive act of abandonment or cessation proved by parol or written evidence (*h*).

There may also be an implied release by merger produced by a union of title to the two tenements. But there must be an estate in fee in both; if not, the right will be revived on severance (*i*). If it be once extinguished, any similar right after severance is considered to be of new creation (*k*).

An original right will not be destroyed by any undue

(*f*) For law of Scotland, see 2 Stair, 7, 12; 2 Ersk. 9, 13; Bell's P. 1012.

(*g*) Shuttleworth *v.* Le Fleming, 34 L. J., C. P. 309. See Welcome *v.* Upton, 5 M. & W. 398; 6 Ibid. 536; 9 L. J. (N. S.) Exch. 154; Mounsey *v.* Ismay, 34 L. J., Exch. 56; Bailey *v.* Stevens, 12 Com. B., N. S. 91; 31 L. J., C. P. 226.

(*h*) Co. Litt. 264 b; Liggins *v.* Inge, 7 Bing. 693; Moore *v.* Rawson, 3 B. & C. 332.

(*i*) Ibid. 313 a, b; Rex *v.* Inhabitants of Hermitage, Carthew, 239; Buckley *v.* Coles, 5 Taunt. 311; Ivimey *v.* Stocker, 35 L. J., Exch. 467.

(*k*) Holmes *v.* Goring, 2 Bing. 83.

excess of enjoyment, nor will it be affected by any immaterial alteration (*l*). But the right of alteration must impose no additional burthen on the land. If the excess cannot be separated from the original right, this right would seem to be altogether suspended till its actual restoration. That event would operate to revive the old right, unless the acts of usurpation have shown an intention to abandon it altogether (*m*).

A distinction as to the mode of discharging an easement has been drawn between rights continuous and intermittent. In a case before the late act, it was said by Littledale, J., that as an easement can only be gained by twenty years' enjoyment, it was argued, it ought not to be lost without non-user for the same period; that the presumption for a release should be the same as for a grant; and this might perhaps apply to rights of common or of way (*n*). But there does not appear to be any ground for this distinction, except so far as the mode of enjoyment strictly requires it. It is admitted in the same case, with respect to light, that a positive act of surrender or abandonment may at any time be effectual, and may depend on parol evidence. The same result, with respect to rights of way and water, may be produced by negative conduct (*o*). The mode of imposing a burthen on land may well differ from that of taking it off. For the law does not favour any derogation of full ownership. In all such cases, it would seem that the true test would be, whether the intermission really implied an intention of abandonment. This would entirely depend on the conduct of those interested. Decisive acts of repudiation, however brief the period, might suffice to raise the presumption of a release by deed (*p*). In the absence of any such acts recourse must be had to the circumstances under

(*l*) Hall *v.* Swift, 6 Scott, 167; Bridges *v.* Blanchard, 4 Ad. & E. 176.

(*m*) Garritt *v.* Sharp, 3 Ad. & E. 325.

(*n*) Moore *v.* Rawson, supra. See also Doe *v.* Hilder, 2 B. & A. 791.

(*o*) Parker *v.* Mitchell, 11 Ad. & E. 788.

(*p*) Norbury *v.* Meade, 3 Bligh, 241.

which the acquiescence occurred; and if no conclusion can be drawn from a longer period, it might then be convenient to adopt the rule referred to. By the Code Napoleon, a continuous servitude is lost by thirty years' non-user; if not continuous, by adverse acts only. Interruption for one year is fatal. The Roman law prescribed ten years for persons present, and twenty years for the absent (*q*). The late Prescription Act is silent with respect to loss by non-user. But it requires the period of user immediately to precede the action.

When an easement has been granted for a particular purpose, which no longer exists, there is an end to the right altogether, and also to any sub-grant which might be claimed. Thus, a canal company, ceasing to be such, and becoming a railway company, cannot dispose of its rights of water (*r*).

(*q*) Art. 706—7, 2243; Inst. (Sandars), lib. 2, t. 3, 4.

(*r*) The National Manure Co. *v.* Donald, 4 Hurl. & N. 8; 28 L. J., Exch. 185.

CHAPTER VI.

THE TRANSFER OF MINES.

I. *The Statute of Frauds, and the Authority of Agents.*
II. *Transfer by Deed.*
III. *Transfer by Will—Duties of Executors.*
IV. *Transfer by Operation of Law.*
V. *Transfer of Shares in Mines.*
VI. *Mining Implements and Machinery.*

Section I.

THE STATUTE OF FRAUDS, AND THE AUTHORITY OF AGENTS.

It is enacted by the Statute of Frauds (*a*), that all leases, estates, interests of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments made or created by livery and seisin only, or by parol, and not put in writing and signed by the parties so making or creating the sale, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either at law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates to the contrary notwithstanding (*b*).

The statute excepts all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised (*c*).

(*a*) 29 Car. 2, c. 3. (*b*) Sect. 1. (*c*) Sect. 2.

But no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law (*d*).

It is further enacted, that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, *or any interest in or concerning them*, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized (*e*).

There can be no doubt that mines and minerals, whether forming a distinct possession or inheritance, or not, are within the provisions of this statute. In either case they form part of the land itself.

It would appear that the first section of this statute is co-extensive with the fourth, and embraces every interest included in the latter section; and consequently every interest which is within the fourth section is equally included in the language of the first, unless the interest come within the saving of the second section. It would also appear that the first section ought to extend to every possible interest in lands which is not within the exception of the second clause (*f*).

It has been suggested in one important case arising upon the statute, that the meaning of the first section must be interpreted by means of the second; and that the leases, estates and interests meant to be vacated by the first section must be understood as of the *like* kind with those in the second section, but which conveyed a *larger* interest to the party than for a term of three years, and such, also,

(*d*) 29 Car. 2, c. 3, s. 3.
(*e*) Sect. 4.
(*f*) See 3 Sugden on Vendors and Purchasers, 134.

as were made under a *rent reserved* thereupon (*g*). This opinion, however, was scarcely called for in that case, and there seems to be no just ground for supporting this view of the section. The first and second sections are not necessarily connected, farther than that the second abridges by its exception the operation of the first; but the first is independent of the second, and must be read without reference to it. If it were necessary, for the purpose of bringing a lease or other interest within the operation of the first section, that it should give a larger interest than for the three years mentioned in the second section, and also some reserved rent, then this anomaly would be produced, that every parol *agreement* for any interest in lands would be void under the fourth section, and yet many actual estates might still be created by parol. Thus an estate in fee might still, as before the statute, be conveyed by livery of seisin without writing; a lease by parol for any number of years, if without rent, would be valid, notwithstanding the statute; and, in like manner, a parol lease for any time not exceeding three years, without any reservation of rent, would be equally valid. The door would thus be open to the very consequences attempted to be remedied by the whole statute—those resulting from perjury. An agreement might fail when an actual demise would be supported; and, in the absence of written evidence, the distinction would be not only difficult to determine, but afford a wide scope for equivocation and falsehood. It must, therefore, be concluded that the first section comprises interests of every possible description relating to lands, and that the exception contained in the second section only excludes the interests particularly specified in it.

A similar construction has been attempted to be extended to the third section. It has been contended that the leases and interests mentioned in that section, and required to be

(*g*) Crosby *v.* Wadsworth, 6 East, 610.

assigned by writing, must be such leases and interests as are required by the first and second sections of the statute to be *created* by deed or writing—viz., those which are limited for a period exceeding three years; but it has been held, that though an interest may be created by parol if not exceeding three years, and reserving two-thirds of the full improved value, yet it cannot be assigned without writing, on account of the third section (*h*); and the same rule applies to a tenancy from year to year created by parol (*i*).

Such appears to be the general construction of these four sections, which may now be examined with reference to our present subject.

The first section, then, requires the creation of any lease, estate or interest in mines to be in writing and to be signed by the parties creating it, or their agents thereunto lawfully authorized by writing.

It must particularly be observed that the authority of an agent to create any lease or interest must be in *writing* from the principal. This authority may, of course, be either general or special, under a general power of attorney, or for a special purpose. In practice, however, a general deputation of authority is not usually resorted to. It would confer too great an authority upon agents to invest them with the power of creating any interest whatever in the mines which may lawfully pass from the grantor, and upon any terms they might think proper. Special powers are, of course, not liable to the same objection, and are adopted in cases when, as in other transactions, the signature of the grantor cannot be conveniently obtained at the proper time and place.

It has been already observed, that the operation of the third section extends to all cases within the meaning of both

(*h*) See Botting *v.* Martin, 1 Campb. Ca. 13.

(*i*) Mollet *v.* Brayne, 2 Campb. Ca. 103. See Stone *v.* Whiting, 2 Stark. Ca. 235; Thomson *v.* Wilson, 2 Stark. 379; Phipps *v.* Sculthorpe, 1 Barn. & Ald. 50; Thomas *v.* Cook, 2 Stark. Ca. 408; 2 Barn. & Ald. 119.

the first and second. All leases and other interests, therefore, in mines and minerals, whether originally created by writing or subsisting by parol, under the second section must be assigned and surrendered in writing by the party himself, or by an agent lawfully authorized by him in writing, as in the first section.

Till lately the assignment or surrender need not have been by deed. A note, or any writing to that effect, so signed by the party or his agent, was sufficient (*k*). But now, by a recent statute, a lease required by law to be in writing, and an assignment of a chattel interest (not being copyhold), and a *surrender in writing* of an interest in any hereditament, not being a copyhold, and not being an interest which might by law have been created without writing, will be void in law unless made by deed; but this enactment, with respect to surrenders, does not extend to Ireland (*l*). Assignments of leases for less than three years, above mentioned, are within the statute, but surrenders of such leases are excepted. These, however, must still be in writing. But there may still be a surrender of any lease by operation of law, which may be presumed by a jury from the delivery of a key, and other facts (*m*).

The fourth section, so far as relates to our present purpose, is confined to any contract or sale of lands, or any interest in or concerning them. For it is quite clear that the words in the remaining part of the section, "or upon any agreement not to be performed within a year," does not extend to an agreement concerning lands (*n*). And it is equally clear that this section contemplates in its operation not only the origin of a contract, but also all transfers of subsisting interests (*o*).

But this section differs materially from the preceding

(*k*) Farmer *v.* Rogers, 2 Wils. 26.

(*l*) 8 & 9 Vict. c. 106, s. 3.

(*m*) Dodd *v.* Acklom, 13 L. J., N. S., C. P. 11.

(*n*) Hollis *v.* Edwards, 1 Vern. 159; Bracebridge *v.* Heald, 1 Barn. & Ald. 722.

(*o*) Anon. 1 Ventr. 361; Poultney *v.* Holmes, 1 Str. 405.

ones in not requiring the authority of an agent to be in writing. It follows, therefore, that though no agents can pass a legal interest under the first and third sections unless their authority, however lawful, be evidenced by writing, yet, under the fourth section, they may, if otherwise lawfully authorized, bind their principal by creating or transferring in writing an equitable interest *in fieri* without being authorized by writing. The extent of the nature of this authority will be noticed presently.

The effect of the statute in transfers of *shares* of mines will also be discussed in this chapter.

In some cases Courts of Equity have supplied the wants of a strict observance with the requisitions of that Statute; but this doctrine has been carried, in some cases, to an exorbitant extent, and Lord Redesdale might justly make the observation, that it was absolutely necessary for the Courts to make a stand, and not carry the decisions further (*p*).

It is decided, however, that if a purchaser take rightful possession of the property (*q*), or if he expend money in improving the condition of the property, *according to the agreement* (*r*), the contract will be considered as in part executed, and the statute will be deprived of its operation. But the payment of a small part of the purchase-money only will not have that effect (*s*). It appears to be the better opinion of the profession that even the payment of a considerable proportion will be equally inoperative (*t*).

(*p*) 2 Sch. & Lef. 5.

(*q*) Butcher *v.* Stapeley, 1 Vern. 363; Pike *v.* Williams, 2 Vern. 465; Lacon *v.* Mertins, 3 Atk. 1; Wills *v.* Stradling, 3 Ves. 378; Bowers *v.* Cator, 4 Ves. 91; Gregory *v.* Mighell, 18 Ves. 328; Kine *v.* Balfe, 2 Ball & B. 343; Morphett *v.* Jones, 1 Swanst. 172.

(*r*) Foxcraft *v.* Lister, 2 Vern. 456; Floyd *v.* Buckland, 2 Freem. 268; Mortimer *v.* Orchard, 2 Ves. jun. 243; Toole *v.* Medlicott, 1 Ball & B. 393.

(*s*) Seagood *v.* Meale, Prec. Ch. 560; Lord Fingal *v.* Ross, 2 Eq. Ca. Abr. 46, pl. 12; Main *v.* Melbourn, 4 Ves. 720.

(*t*) Butcher *v.* Butcher, 9 Ves. 382; Clinan *v.* Cooke, 1 Sch. & Lef. 22. And see 1 Ca. & Op. 136; 1 Sug. V. & P. 208.

There cannot be a part performance of an incomplete agreement (*u*).

Payment of rent will be a sufficient part performance to establish a parol agreement for a lease (*v*).

A licence to work mines is very distinguishable from a lease of mines. The former is an incorporeal hereditament, a mere right, which only confers a right of property in the minerals when they have been severed from the freehold, and taken into the possession of the party. A lease, on the other hand, is a distinct conveyance of an actual interest in the thing demised, the right to which attaches even before any part of the substance is extracted or taken. The difference in the creation and properties of a licence and a lease will be discussed in another chapter.

A licence or liberty to work mines is very usual in many mining countries. When an adventure is entered upon, a regular lease is often deferred till the prospects of the enterprise promise such results as may require a more particular arrangement; and the mine is, in these cases, often worked under a licence. In other districts a licence is often accepted as a permanent instrument. It becomes, therefore, very important to ascertain whether such a licence be within the Statute of Frauds.

There can be no doubt that such licences are directly within the meaning of the statute, as conferring interests in land.

As a licence is also, without doubt, the grant of an incorporeal hereditament, it can only be created and transferred *by deed*, as will be more fully noticed hereafter. The first, second and third sections of the Statute of Frauds are, therefore, on this account, inoperative with respect to licences, for they require no more than what was requisite before. The operation of the statute is, in fact, limited to its fourth section.

(*u*) Thynne *v.* Lord Glengall, 2 H. L. Ca. 131.

(*v*) Nunn *v.* Fabian, 35 L. J., Chanc. 140.

It has, certainly, been held that a mere licence is, in some instances, not within the first, and, by implication, the fourth section of the statute.

A parol agreement was entered into for liberty to stack coals on part of a close for seven years, and, during this term, the person to whom it was granted should have the sole use of that part of the close upon which he seems to have the liberty of stacking coals. Lee, C. J., and Dennison, J., were of opinion that the agreement was good, and relied upon the authority of Webb and Paternoster (*x*), where it was held, that a grant of a licence to stack hay upon land did not amount to a lease of the land. They maintained that the agreement in the present case was only for an easement, and not for an interest in the land—that it did not amount to a lease, and, consequently, it was not within the Statute of Frauds. Forster, J., said, that the agreement did not amount to a lease, but he inclined to think that the words in the statute, any "uncertain interest in land," extended to the agreement; upon which the other judges observed, that these words related only to interests uncertain as to the time of their duration. It was ultimately decided that the agreement was good for the seven years (*y*).

Now, with respect to the case of Webb and Paternoster, relied upon in the above case, it is sufficient to observe, that the decision there was come to upon another point, and that that case arose before the Statute of Frauds. It was even there held, that the interest under the licence was such as bound the land in the possession of a subsequent lessee. The statute does not apply exclusively to leases and estates in land. It applies to all *interests*. A right to enter alone is an interest, much more a right to use and occupy to the exclusion of others. The decision, therefore, in Wood *v.* Lake was directly against both the spirit and language of the statute.

(*x*) Palm. 71.

(*y*) Wood *v.* Lake, Say. 3.

That decision, however, has been followed in several cases, but the point seems to have been very carelessly discussed. It has been successfully held, that a parol licence to put a skylight over an area, a parol agreement for leave to inhabit a house, a parol licence to build a house on the waste of a manor, and a parol beneficial licence to be exercised upon land, are all valid as not conferring interests in lands (*z*).

In the above cases there was simply a right either to control *pro tanto* the right of ownership in the lands of another, or to use and occupy the land for a definite purpose, and without any liberty for converting or appropriating the land for other purposes. But a licence to work mines is very different. It confers not only a right to enter and occupy, but to commit waste and carry away part of the land itself—viz., the minerals. It seems, therefore, impossible to contend that this right is not an interest within the Statute of Frauds. To assert that it would be necessary to maintain that the minerals are not part of the land.

An interest in land may exist where there is no actual estate in the land. And it has, in other cases, been determined that such an interest is within the meaning of the statute.

Thus it has been decided that sales of growing poles, of standing underwood, of a crop of mowing grass, are all within the statute (*a*). It is true, the cases upon this subject are very conflicting, and that the leaning in the later decisions is certainly in favour of bringing the *produce* of the land not within the first and fourth sections, but the

(*z*) Winter *v.* Brockwell, 8 East, 308; Rex *v.* Inhabitants of Standen, 2 Maul. & Sel. 461; Rex *v.* Inhabitants of Hornden, 4 Maul. & Sel. 562; Tayler *v.* Waters, 2 Marsh. 551; 7 Taunt. 374. But see Cocker *v.* Cowper, 1 Cro., Mees. & Ros. 418; Fentiman *v.* Smith, 4 East, 107; Hewlins *v.* Shippam, 3 Barn. & C. 233.

(*a*) Teall *v.* Anty, 4 Moo. 542; Scorall *v.* Boxall, 1 You. & Jerv. 396; Crosby *v.* Wadsworth, 6 East, 602. See Carrington *v.* Roots, 2 Mees. & Wels. 248.

seventeenth section, which enacts, that no contract for the sale of goods, wares and merchandize, for the price of ten pounds or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum of the bargain be made and signed by the parties, to be charged by such contracts, or their agents thereunto lawfully authorized (*b*). But notwithstanding this inclination, it is not to be supposed that the Courts will ever repudiate the distinction of Lord Ellenborough in the case of Crosby *v.* Wadsworth, where he said, with respect to a growing crop of grass, that, in the outset, he felt himself warranted in laying wholly out of the case the provision contained in the seventeenth section, as not applicable to the subject-matter of that agreement, which could not be considered in any proper sense of the words as a sale of goods, wares or merchandize, the crop being at the time of the bargain (and with reference to which he agreed with Mr. Justice Heath in Waddington *v.* Bristow (*c*), that the subject-matter must be taken) an *unsevered* portion of the freehold, and not moveable goods or personal chattels (*d*).

In a late case (*e*), where a farm was agreed to be let by parol, and the tenant was to take the growing crops and pay for them, and also for the work, labour and materials, in preparing the land for tillage, it was decided that this case was within the fourth section of the statute. It was held by the Court, that at the time when the contract was made the crops were growing upon the land, the tenant was to have had the land as well as the crops, and the

(*b*) See Waddington *v.* Bristow, 2 Bos. & Pul. 452; Evans *v.* Roberts, 5 Barn. & Cress. 829; Parker *v.* Staniland, 11 East, 362; Warwick *v.* Bruce, 2 Maul. & Sel. 205; Smith *v.* Surman, 9 Barn. & Cress. 561; Sainsbury *v.* Matthews, 4 Mees. & Wels. 343; Dunne *v.* Ferguson, 1 Hayes, 541.

(*c*) Supra.

(*d*) See also Boyce *v.* Green, Batty, 608, supra.

(*e*) Lord Falmouth *v.* Thomas, 1 Crompt. & Mees. 89.

work, labour and materials were so incorporated with the land as to be *inseparable* from it. He would not have the benefit of the work, labour and materials, unless he had the land, and they were of opinion that the right to the crops, and the benefit of the work, labour and materials, were *both* of them an interest in the land (*f*).

It was decided in the above case of Carrington *v.* Roots (*g*), that an agreement under the fourth section, though altogether void, may have some operation in communicating a licence, so far as to excuse what would otherwise be a trespass; but such a licence could confer no interest, and would be always countermandable at the will of the party.

The construction and duration of licences will be afterwards considered.

It may be proper, in this place, to advert briefly to the general nature of agreements within the statute, the signature of the party or his agent, and the authority of the agent to bind his principal.

It has been clearly established by a multitude of cases, that the signature of the *party to be charged* is alone sufficient to constitute an agreement, so as to bind the person so signing. In a late case upon the subject, the Court said that there was no reason for saying that the signature of both parties is that which makes the agreement. The agreement, in truth, is made before any signature. A common case is when an agreement arises out of a correspondence. It often happens that a party is unable to give evidence of his own letter, and he is not to be de-

(*f*) See also Rodwell *v.* Phillips, 9 M. & W. 501; 11 L. J., N. S., Exch. 217; Ruffey *v.* Henderson, 21 L. J., Q. B. 49; Hodgson *v.* Johnson, 28 L. J., Q. B. 88; E. B. & E. 685.

(*g*) 2 Mees. & Wels. 257. See also 3 Barn. & C. 232.

feated, because he cannot produce a formal agreement signed by both the parties to the contract (*h*).

These decisions do not infringe upon the rule of law, that there must be mutuality to render a contract valid. It must be remembered that the law of England recognizes only two species of contracts, viz., those by specialty, and those by parol, and that there is no third class of contracts in writing (*i*). These latter contracts are only parol agreements, *evidenced* by writing. The nature of the agreement and its legal consequences are not affected by its being reduced into writing. There may still be the requisite mutuality; but in consequence of the Statute of Frauds, one party may be in a situation which may preclude him from availing himself of the contract (*k*).

It is also established that when a contract in writing binds one party, any subsequent note or admission in writing, or a letter which either contains the terms of the contract, or refers to any writing which contains them, will be sufficient to bind the other party, even if it be not written with any such intention (*l*).

But there must, in all such cases, be evidence of a concluded agreement; and the terms must be specified or accepted without any qualification or new stipulation (*m*).

(*h*) Laythoarp *v.* Bryant, 2 Bing. N. C. 735. See Hatton *v.* Gray, 2 Ch. Ca. 164; Cotton *v.* Lee, 2 Bro. Ch. Ca. 564; Coleman *v.* Upcot, 5 Vin. Abr. 527, pl. 17; Backhouse *v.* Crosby, 2 Eq. Ca. Ab. 32, pl. 44; Seton *v.* Slade, 7 Ves. 265; 2 Jac. & Wal. 428; Fowle *v.* Freeman, 9 Ves. 355; Wain *v.* Warlters, 5 East, 10; Allen *v.* Bennet, 3 Taunt. 169; Smith *v.* Neale, 2 Com. B., N. S. 67; 26 L. J., C. P. 143; Reuss *v.* Picksley, 35 L. J., Exch. 218.

(*i*) Rann *v.* Hughes, in error, Dom. Proc. 7 T. R. 350, note (*a*).

(*k*) See Thornton *v.* Kimpster, 5 Taunt. 788; Egerton *v.* Matthews, 6 East, 307.

(*l*) Dobeler *v.* Hutchinson, 3 Adol. & Ell. 355; Coles *v.* Trecothick, 9 Ves. 234; Blagden *v.* Bradbear, 12 Ves. 466; Huddleston *v.* Briscoe, 11 Ves. 583.

(*m*) Knight *v.* Crockford, 1 Esp. Ca. 189; Huddleston *v.* Briscoe, supra; Stratford *v.* Bosworth, 2 Ves. & B. 341; Ogilvie *v.* Foljambe, 3 Mee. 53; Holland *v.* Eyre, 2 Sim. & Stu. 194; Routledge *v.* Grant, 4 Bing. 653; Smith *v.* Surman, 9 Barn. & Cress. 561; Blagden *v.* Bradbear, supra; Brodie *v.* St. Paul,

When the terms are accepted by reference to another document, the description of this document must be sufficiently precise, so as to prevent its being mistaken or substituted for another.

The memorandum in writing, in one case, was this—"Sold 100 mining purdy's, at 17*s.* 6*d.* J. Greene." It was insisted by the purchaser that the defect in the memorandum was supplied by the seller having admitted the agreement by sending to the purchaser another paper, in these words—"I hereby undertake to have transferred to Messrs. John and I. Boyce 100 shares in the Mining Company of Ireland as soon as the books are opened for that purpose. Value received, 7th January, 1825. James Greene." But it was held, that this document could not answer the objection made to the other, for it did not refer to it, and could not be connected with it or called in aid of it; and, besides, this document varied from the other in two respects; first, in the names of the parties, for it was an undertaking to transfer to Messrs. John and I. Boyce; secondly, a certain condition was introduced into it which was not in the other instrument (*n*).

It has been decided, that if a man be in the habit of printing or stamping instead of writing his name, he will be considered to have signed within the meaning of the statute (*o*), and when the name is inserted in such a manner as to have the effect of giving authenticity to the whole instrument, it does not much signify in what part of the instrument it is to be found (*p*).

1 Ves. jun. 326; Higginson *v.* Clowes, 15 Ves. 516; Lindsay *v.* Lynch, 3 Sch. & Lef. 1. See Lofft, 801; 9 Ves. 252; Stokes *v.* Moore, 1 Cox, 219; Popham *v.* Eyre, Lofft, 786; Gordon *v.* Trevelyan, 1 Price, 64; Blore *v.* Sutton, 3 Mer. 237; Price *v.* Assheton, 1 You. & Col. 441; Kenworthy *v.* Schofield, 2 Barn. & Cress. 945.

(*n*) Boyce *v.* Greene, Batty, 608.

(*o*) Saunderson *v.* Jackson, 2 Bos. & Pul. 238; Schneider *v.* Norris, 2 Maul. & Sel. 286.

(*p*) Stokes *v.* Moore, 1 Cox, 219; Allen *v.* Bennet, 3 Taunt. 169; Cooper *v.* Smith, 15 East, 103; Morison *v.* Turnour, 18 Ves. 175; Propert *v.* Parker, 1 Russ. & Myl. 625; Saunderson *v.* Jackson, 2 Bos. & Pul. 238.

It has even been held, that if the party sign in form as a witness, the statute will be satisfied (*q*), unless it be doubtful in what capacity he actually did sign.

An agent, it has been seen, *lawfully authorized*, may *contract* in writing for the creation and transfer of any estate or interest in lands. The fact of agency may be proved by parol evidence (*r*).

The fact of agency may also be implied by law, as in the case of an auctioneer in the discharge of his duty (*s*), or his clerk (*t*).

In a case where an agreement was entered into for the demise of mines in Ireland, it appeared that the agreement had been effected by the agent for a proposed joint stock company, and particularly on behalf of his principal, who was engaged in projecting the company. The agent, who was to hold 1/32[d] shares for his services, negotiated the agreement in his own name; but it was mentioned in it that he had *induced a company* to work the mines, and the proposal was made for them. He afterwards repudiated the company and the principal, and claimed the exclusive benefit of the agreement. But the fact of agency was held to be fully proved, and he was ordered to deliver up the agreement to the company (*u*).

The authority of an agent may always be revoked at any time before the agreement is executed according to the statute, although the agent may have entered into a *verbal* agreement.

On the other hand, a principal may afterwards adopt the act of a man assuming the authority of an agent without authority at the time; and if the principal ratifies the

(*q*) Welford *v.* Beazely, 1 Ves. 6; Coles *v.* Trecothick, 9 Ves. 234. See Blore *v.* Sutton, 3 Mer. 237. See Sugden on Vend. & Pur. 1, 182.

(*r*) Wilson *v.* Hart, 1 Moore, 45.

(*s*) Emmerson *v.* Heelis, 2 Taunt. 38. See 1 Cas. & Op. 142, 143; White *v.* Proctor, 4 Taunt. 209; Kemys *v.* Proctor, 3 Ves. & B. 57; 1 Jac. & W. 350.

(*t*) Bird *v.* Boulter, 1 Nev. & Man. 313; 4 Barn. & Ad. 447.

(*u*) Taylor *v.* Salmon, 4 Myl. & C. 134.

contract of such a person, he will be afterwards bound by it (*v*).

Agreements with respect to mines are frequently entered into by agents. It becomes, therefore, a matter of importance to ascertain to what extent the authority of a mining agent may be lawfully carried.

The authority of an agent is either *special* or *general*, and this distinction will pervade all his acts. When some specific and particular purpose is to be effected by agency, and the agent thus employed has no other relation with his employer, than that which results from the particular employment, the authority of the agent will be necessarily limited to the definite object of his appointment. His power will be *special;* and as no inference can be drawn from this position, with respect to his principal, that he is invested with any other authority than that which may be fairly implied from the nature of his trust, it will be the duty of all persons who contemplate any transactions with him to ascertain the extent of his power (*x*). In such cases, the principal will not be bound if his confidence is abused by the conduct of his agent, because no reasonable presumption can be formed by the public with respect to the probable extent of the authority reposed in the latter. On the other hand, if a person is invested generally and permanently with the management of another person's affairs, or of any particular department of that person's affairs, the agent will, in such cases, possess a *general* authority, and he will be presumed, from his situation, to be empowered to do many acts which would otherwise require a special permission. The principal will be bound by the acts of such an agent, even if those acts are fraudulent or in defiance of express orders; because the public cannot be expected, in such cases, to discriminate between a full and

(*v*) Maclean *v.* Dunn, 4 Bing. 722; 4 Moo. & Pay. 761; Gosbell *v.* Archer, 2 Ad. & Ell. 500.

(*x*) Pickering *v.* Busk, 15 East, 43.

a limited amount of authority, because no dealings with such persons could otherwise be safely concluded, and because it is the duty of a principal to see that his power is not delegated to an improper person (*y*).

When a special or general authority is given in writing, its construction and extent will be determined by the Court (*z*). But whatever may be the construction of documents defining the duties of a general agent, persons dealing or contracting with him will still be entitled to presume an authority commensurate with his situation as a general agent, unless they have distinct notice of his power having been abridged by special restriction or usage.

It still remains, therefore, to be seen, what acts with respect to mines a general agent will be authorized to perform.

The general rule upon this subject is, that as between third persons the authority of the agent is to be measured by the extent of his usual employment.

There may be a general agent for the transaction of a distinct department of business; and an employment in one kind of business will afford no presumption of authority to act in another (*a*).

In mining countries, agents are frequently employed to attend exclusively to the mining concerns of their principal. The acts of those agents are frequently very extensive, but the same principle of law will apply to them as to agents in general, viz., they will be presumed to be invested with authority in those particular acts which they have been in the habit of exercising, and which have never been questioned or repudiated by their principal. The general usage of the country, and the ordinary mode of transacting business, will, in the absence of more specific

(*y*) Edmunds *v.* Bushell, 35 L. J., Q. B. 20; 1 Law Rep., Q. B. 97.

(*z*) Collis *v.* Emmett, 1 H. Bla. 313.

(*a*) Boucher *v.* Lawson, Rep. tem. Hard. 85; Fenn *v.* Harrison, 3 T. R. 757; 4 T. R. 177; Nickson *v.* Brohan, 10 Mod. 109.

instructions conveyed to the persons to be dealt with, sufficiently affect the liability of the principal. It is for the consideration of a jury to determine, in doubtful cases, what acts of the agent may be reasonably authorized by the general nature of his employment, or by the recognition of his principal. It has been decided in one case, that the sanction of a single purchase upon credit by a servant bound the master to a succeeding one in the same way (*b*). It may be laid down as a general rule, that all the acts of a mining agent which are sanctioned by usage, and which he may in other respects lawfully perform, will be binding upon his principal.

It has been seen, that no agent has the power to bind his principal under the first and third sections of the Statute of Frauds, unless he is authorized so to do by writing. A general agent, whose authority for that purpose is not evidenced by writing cannot, therefore, create or assign a *legal* estate or interest in minerals or lands. But he may create and transfer by agreement in writing, an *equitable* interest in property of this description, in the name of his employer. An agreement, therefore, by such an agent, for the partial or even the complete alienation of the mines and minerals of his principal, will be valid, if such alienations fall within the general rule of the presumption of an authority established by usage, or the recognition of former acts of the same nature and extent. Thus, if a mining agent has been in the habit of agreeing for the demise or grant of veins or seams of minerals for limited or extensive periods, he will create an equitable interest in them which will be binding on his principal. But he must, in such instances, always conform to the particular usages which have been established in this exercise of his authority. He will not be allowed to bind his principal by the adoption of a mode of transacting business contrary to previous regulation and an established custom

(*b*) Hazard *v.* Treadwell, 1 Str. 506.

which may have been acquiesced in by the latter. Thus, it is presumed, the introduction of unusual stipulations with respect to the operations of mining, or the agreement for a demise or a licence to work for an unwarrantable period of time, will not be binding upon the owner without his consent or recognition. But agreements of this kind may, of course, bind the other parties, and also *pro tanto* the principal.

In conclusion, it may be submitted, that when a mining agent signs an instrument which, in its language, amounts to an actual demise or licence, but which necessarily fails in conferring a legal interest for want of the written authority of the agent, such an instrument will still be supported as a sufficient *agreement* to bind the principal. The earlier decisions were in favour of a present demise, even when on the face of the document it was quite clear that a regular lease was afterwards to be executed (*c*).

This principle has now been departed from (*d*); but, it is presumed, it never could apply to cases where an actual and present demise could not, as in the present instance, possibly be created. When words of present demise are unqualified by expressions of a contrary tendency, and the grantor was not disabled from granting leases, there could certainly have been no pretence for any different construction; but it is a familiar principle of law, that when an instrument is incapable of operating in one way, it may acquire validity in another way—*ut res magis valeat quam pereat.* Thus, a feoffment or a grant may fail in their legal operation, and yet bind the feoffor or grantor in

(*c*) See Barry *v.* Nugent, cited 5 T. R. 165; Right *d.* Green *v.* Procter, 4 Burr. 2208; Doe *d.* Potter *v.* Archer, 1 Bos. & Pul. 531; Maldon's case, Cro. Eliz. 33; Harrington *v.* Wise, Cro. Eliz. 486; Noy, 57.

(*d*) Doe *d.* Abrahall *v.* Browne, 2 Black. Rep. 973; Tempest *v.* Rawling, 13 East, 18; Sturgeon *v.* Painter, Noy, 128; Pleasant *v.* Higham, 1 Roll. Ab. 848; Goodtitle *d.* Estwick *v.* Way, 1 T. R. 735; Doe *d.* Coore *v.* Clare, 2 T. R. 739; Doe *d.* Jackson *v.* Ashburner, 5 T. R. 163; Doe *d.* Bromfield *v.* Smith, 6 East, 530; Morgan *d.* Dowding *v.* Bissell, 3 Taunt. 65.

equity; and thus, it is submitted, a mining agent will be held to have done only what he could lawfully have done for his principal.

There must always be a valuable consideration, in order to induce a court of equity to carry an agreement into effect. The usual terms, in mining contracts, consist in the render of a proportionate part of the mineral, or of a money rent. These terms will, of course, form a sufficient consideration, and they need not appear on the face of the instrument, if they can be ascertained with *certainty* by express or implied reference to some established usage (*e*).

By the act for the registration of real estates, 25 & 26 Vict. c. 53, s. 9, the applicant must state in his description whether he claims the minerals. Unless expressly mentioned, they are deemed not to be included. If they are mentioned, the registrar must give especial regard thereto in all subsequent inquiries and investigations.

Section II.

TRANSFER BY DEED.

When the mines form part of the general inheritance, they will, of course, be transferred along with the lands without being expressly mentioned in the conveyance (*f*); but when they form a distinct possession or inheritance, a distinct title to them must also be established.

In the latter situation the mines will still, of course, retain the qualities of real estate, and will be transferred by conveyances applicable to the particular disposition of them intended to be made.

They are capable of livery, and of being made the sub-

(*e*) See Chap. VIII.

(*f*) Keyse *v.* Powell, 2 Ell. & B. 132; 22 L. J., Q. B. 305.

jects of ejectment (*g*). "By the name of *minera*," says Coke, "or *fodina plumbi*, &c., the land itself shall pass in a grant, if livery be made, and also be recovered in an assise" (*h*).

It has been stated, that if a grant of mines be made without livery, the grantor will only take a power to dig and work them (*i*). But now, by a late statute, all corporeal hereditaments are declared, as regards the conveyance of the immediate freehold, to lie in grant as well as in livery (*k*).

It has also been stated, that a common recovery could not have been suffered of a quarry, or a mine, because they are not in demesne, but in profit only (*l*). But this is not correct. Mines and minerals are parts of the very lands or demesnes themselves.

A distinction was formerly taken between the transfer of opened and of unopened mines. Unopened mines have been thought so far to resemble an estate in remainder as to be incapable of livery of seisin, and to be only passed by grant. This opinion has been founded on the decision that unopened mines are not liable to dower (*m*). It will be afterwards shown (*n*) that that doctrine rests upon very different grounds from those founded on the notion that unopened mines bear any resemblance to an estate in remainder. All unsevered mines, whether opened or unopened, are parts of the freehold and inheritance, and they are equally in the possession of the tenant (*o*). It was expressly held before the late statute, that mines do not lie in grant (*p*). As real hereditaments, they pass by livery of

(*g*) Comyn *v.* Kyneto, Cro. Jac. 150; Barnes *v.* Mawson, 1 Maul. & Sel. 77; Wilkinson *v.* Proud, 11 M. & W. 33; 12 L. J., N. S., Exch. 227.

(*h*) Co. Litt. 6 a.

(*i*) Shep. Touch. 96.

(*k*) 8 & 9 Vict. c. 106.

(*l*) Pigot, 96; 18 Vin. Abr. 218.

(*m*) Burton's Comp. 386.

(*n*) See Sect. 4 in this chapter.

(*o*) Lewis *v.* Branthwaite, 2 Barn. & Ad. 437.

(*p*) Chetham *v.* Williamson, 4 East, 476.

seisin. Even unopened mines, severed from the inheritance, are not incapable of livery. The *mines* are not strictly the subjects of transfer, but the *minerals* which are acquired by mining. These minerals, or the mineral veins, are almost always so far accessible from the surface as to be capable, either by ordinary or mechanical means, of livery, without the actual operation of mining. When they are not accessible, it has been suggested that a symbolical seisin might be given (*q*). But the point is now no longer of practical importance.

Mines are very frequently excepted in a conveyance. When the exception contained in a deed of *feoffment* is in favour of the grantor, there can be no necessity for livery, because the grantor will never have been out of possession of the thing excepted (*r*). But when the exception is in favour of third persons, or strangers to the legal estate, this livery cannot be dispensed with.

A conveyance in fee was made by a mortgagor and a mortgagee of certain lands to a purchaser; and the purchaser, by the same deed, covenanted and granted to the mortgagor and his heirs, that it should be lawful for them to enter and work coal or other mines, with a proviso that deduction for damages done should be made from a yearly rent which was also granted to the mortgagor. The mines were worked under the authority of persons claiming under a title derived from the purchaser; and an action of trover was brought against them by one claiming under a title derived from the mortgagor. The question was, whether the mortgagor had an exclusive right to the coal under the lands conveyed, or only a concurrent right with the purchaser, from whom the defendant claimed—and it was amongst other things contended for the plaintiff, that the covenant and grant amounted to a reservation and exception of the coal in the grant to the pur-

(*q*) Wilkinson *v.* Proud, supra.

(*r*) Co. Litt. 47 a; Doe *d.* Douglas *v.* Lock, 1 Ad. & Ell. 743.

chaser; the legal estate and inheritance of which remained in the mortgagor, and those claiming under him. It was held by Lawrence, J., that the covenant could not operate as an exception or reservation in favour of the mortgagor, who had no legal estate in him at the time, but only the equity of redemption. He was in law no more than a stranger to the estate, and could not except or reserve that which he had not before. The covenant, therefore, could only operate as a grant; but a grant would not pass the land itself without livery (*s*). This case was in fact decided on the ground of the grant amounting only to a licence. Since the late statute the mines might pass as land, if the words admit of that construction.

If there be no express exception of the mines, and no clear intention that they are not to pass under the conveyance, even when the grantor is in possession of the legal estate, the exception or reservation will only amount to a licence to work. This was the early case of Lord Mountjoy, who was seised of two parts of a manor, and who conveyed them to purchasers, with a proviso and covenant that it should be lawful for the grantor and his heirs to dig for ore in the wastes, and to dig turf for making alum, without interruption of the purchasers, or their heirs. This was held to be no exception of the minerals as land (*t*).

In a late case of a very unskilful instrument, there was an actual demise of coal for twelve years, with liberty for the lessees, their *executors*, &c., to get the remainder then unworked in a workmanlike manner, till all the coal should be gotten and disposed of, at the rate of 70*l.* per acre, payable yearly. It was held, that at the end of the term of twelve years the deed operated as a licence, which was either for life, and which had therefore expired by the

(*s*) Chetham *v.* Williamson, 4 East, 469. See Earl of Cardigan *v.* Armitage, 2 Barn. & C. 197.

(*t*) Godb. 17; 4 Leon. 147; 1 And. 307; Moore, 174.

deaths of all the parties, or for years; and if the latter, it would be void for want of certainty of years.

It was, however, contended in argument, that the deed would operate under the Statute of Uses as a bargain and sale of a chattel interest, and would require no enrolment, and that no technical words were necessary for conferring such an interest commensurate with the purpose designed. It was held, that as there was no averment that the lessees elected to take the interest by way of use, and as that election was necessary on the authority of Heyward's case (*u*), and Miller *v.* Green (*v*), the argument could not avail. The Court said, the lessees had entered and got coals, so as to produce an entry for the twelve years, and it would probably be a conclusive election that the whole deed should operate at common law. But on leave being given to amend the pleas, the point was again argued. But it was held, that even if it could be assumed that a bargain and sale could give the right to enter and take the coal till all should be got, yet an election was necessary, and should have been made by the bargainees themselves, and not by the survivors or the executors, because, after the death of the survivor all interest in the deed, as a grant at common law, was at an end, and the election must be made while there is the power to make the choice (*w*).

By statute 39 Geo. 3, c. 21, s. 12, the mines and minerals in any lands sold by any ecclesiastical corporation, for the redemption of land-tax, are absolutely excepted in like manner as if they had been expressly excepted in the conveyance, and cannot be comprised therein by any description. But this enactment does not apply to sales under the previous land-tax act, 38 Geo. 3, c. 60, which contains no such provision, although the

(*u*) 2 Rep. 35.
(*v*) 8 Bing. 92.
(*w*) Haigh *v.* Jagger, 16 Mee. & W. 525; 17 L. J., N. S., Exch. 110; Ibid., 18 L. J., N. S., Exch. 125.

purchase-money might not be paid into the Bank of England until after the passing of the later act (*x*).

In a purchase deed, it was recited that the purchaser was the highest bidder for four closes of land, excepting the mines and beds of coal within them, and was declared to be the purchaser. In the granting part of the deed, the mines and beds of coal were excepted under a description which referred to a lease for a term of years granted to lessees some years previously. The lease comprised only two of the beds of coal, and the purchaser claimed the remainder. But it was held, that the recital controlled the operation of the deed, and that none of the coal passed to the purchaser (*y*).

Section III.

TRANSFER BY WILL—DUTIES OF EXECUTORS.

Mines, under almost any circumstances, are of variable and uncertain value. They are described by Lord Hardwicke as being in the nature of a trade (*z*). But they are not always treated as part of the perishable property of a testator. When mines, whether worked or unworked, and whether forming a distinct inheritance or not, are devised as the freehold or copyhold hereditaments of the testator without any directions for conversion, or if they descend in this state to the heir, they will follow the course of alienation pointed out by the testator, or by the will of the law, without being subject to the rules applicable to personal property of a perishable description; for in such cases mines are placed beyond the general control of trustees and personal representatives; and they must be enjoyed in the manner in which they devolve or descend.

(*x*) Wilson *v.* Grey, 36 L. J., Ch. 62.

(*y*) Denison *v.* Holiday, 28 L. J., Exch. 25; 3 Hurl. & N. 670.

(*z*) 1 Bro. C. C. 289; 3 Atk. 14.

If, again, the mines form part of the personal property of the testator, either in connection with the lands in which they are situate, or as a separate possession in the lands of others, and are devised as a specific bequest, either immediately to the parties intrusted or through the intervention of trustees for them, the subject of devise must also be taken and enjoyed in the mode appointed by the testator. It will make no difference if the objects of the testator's bounty are directed to take absolutely or in succession for limited interests, with remainders over. As the testator has not thought proper to direct a sale, the law presumes that he intended his property to be enjoyed in the actual condition in which it is left by him. The ordinary principles of law which will be presently mentioned, and which arise from the propriety of avoiding risk in winding up the affairs of a testator, or of making adequate provision for persons successively interested in the subject of devise, are therefore deprived of their operation (*a*).

It remains only to consider therefore the consequences resulting from a devise of mines when they form, or are directed to form, personal property, and are not the subjects of a specific devise or of any special directions.

The law imposes upon an executor and administrator the duty, and affords him the power, of collecting the assets and distributing the effects of a testator; generally speaking, they have the complete control over the personal property of the deceased (*b*). It is their duty to perform their trust in a manner most advantageous to the estate. When mines, therefore, have been vested in an executor without any special directions with respect to them, or pass to the administrator by operation of law, these personal representatives will have full power to dispose of them, without

(*a*) Gibson *v.* Bott, 7 Ves. 96; Howe *v.* Lord Dartmouth, 7 Ves. 147; Vincent *v.* Newcombe, 1 You. 599; Alcock *v.* Sloper, 2 My. & K. 699; Collins *v.* Collins, ibid. 703; Pickering *v.* Pickering, 2 Beav. 31; Bethune *v.* Kennedy, 1 My. & C. 114.

(*b*) Whale *v.* Booth, 4 T. R. 625; Nugent *v.* Gifford, 1 Atk. 463.

reference to the fact of their being classed amongst property of a perishable and uncertain nature. It has been held, indeed, that direct acts of abuse, misapplication of assets, fraudulent or neglectful mismanagement of the estate, will charge them with the consequences of a *devastavit* and will render them personally liable (*c*). But courts of equity have always been extremely liberal in defining the duties of an executor or administrator, and cautious in rendering them liable upon slight grounds (*d*). There does not appear to be any reason for concluding that a personal representative is obliged, under such circumstances, to dispose of the mining property of the deceased, although he would certainly be liable for consequences induced by carrying on, or concurring in carrying on, mining speculations in an unreasonable or neglectful course of mismanagement. It has been seen that mining is a kind of trade, though it would be impossible to establish any complete analogy to ordinary trading. Now, the personal representatives of a deceased owner have, in general, no authority to carry on his business (*e*). With respect to the public, they will become personally liable, on failure of assets, to all debts contracted in connection with it since the death of the owner (*f*).

It may be observed, however, that in cases of distinct contract by the deceased, the representatives will be bound to carry on a business (*g*). This sometimes happens in case of partnership.

It is, of course, competent for a testator to direct that his mines shall be carried on after his decease out of general or specific funds,—whether real or personal—and,

(*c*) See Wentworth, Off. Exors. 302; Bac. Abr. Ex. (L) 1.

(*d*) See Powell *v.* Evans, 5 Ves. 843; Raphael *v.* Boehm, 13 Ves. 410; Tebbs *v.* Carpenter, 1 Madd. 298; Garrett *v.* Noble, 6 Sim. 504.

(*e*) Barker *v.* Barker, 1 T. R. 295; Ex parte Garland, 10 Ves. 119.

(*f*) Wightman *v.* Townroe, 1 M. & S. 412.

(*g*) Marshall *v.* Broadhurst, 1 Cromp. & J. 405; 1 Tyrw. 350; Fearenside *v.* Derham, 13 L. J., N. S., C. C. 354.

in such cases, as in the instance first mentioned, the trustees or executors should first exercise their option of being the instruments of fulfilling the desire or the obligation, or of declining to act in the affairs at all. Thus, a testator directed his executors to continue his business of a coal proprietor during his present interest in certain mines taken by him, and that they should not be responsible for any loss to his estate, except for wilful neglect. The mines were held for a term of years, eight of which were unexpired. The testator was possessed both of real and personal estate, and the title deeds of the real estate had been deposited by the executors to secure advances made for the colliery. It was contended that, in cases of such directions, where no particular fund was set apart for the purpose, no other part of the assets of the testator, except the capital in the business, was liable for any debt owing in respect of it. Stuart, V. C., said, the business was limited in its nature and period—that the assets, real and personal, were liable for all the covenants in the lease—and that, as the executors were not to be personally liable, the testator meant that his estate should be liable for the expenses of the trade (*h*). But on appeal, it was held that the executors had no such power, and that no portion of the assets beyond that employed in the trade at the time of death could be used. It was observed by Turner, L. J., that all administration of the estate would otherwise be suspended till the trade was wound up. This construction was so unreasonable that the Court would never resort to it unless words were found for the purpose which did not exist in that case. It was said the executors might not have the means of carrying on the trade—but, if so, they should come to a Court of Equity for directions to know what they were to do (*i*).

In a similar case, a testator held certain collieries for a

(*h*) M'Neille *v.* Acton, 22 L. J., N. S., C. C. 820. See also Fearenside *v.* Derham, 13 L. J., N. S., C. C. 354.

(*i*) Ibid., 23 L. J., N. S., C. C. 11.

term of twenty-one years, which he carried on with co-partners till his death. By his will, he gave the income of his residuary real and personal estate to his wife for life, with remainder over. The widow filed a bill for the income of the residue. It appeared that the lease would not expire for many years, and that, till then, the liabilities of the estate under the lease, which contained several onerous covenants on the part of the lessees, could not be ascertained and liquidated. Wigram, V. C., held that the tenant for life was only entitled to the income of the true residue, and that, as the capital in the hands of the executor was admitted not to be a sufficient security for the possible breach of the covenants, the fund must accumulate in Court till the expiration of the lease (*k*).

When articles or other property are devised with the mines to which they belong, the description should be either sufficiently general, or not so minute, as by enumerating some to cause it to be presumed that others are excluded. In the latter case things *ejusdem generis* will only pass. Thus, in Stuart *v.* Marquis of Bute (*l*), the testator devised his estates and collieries to his wife for life, with remainder to his grandchildren. He gave all his waggon-ways, rails, staiths, and all implements, utensils *and things* which at the time of his death should be used or employed together, with, or in, or for the working, management or employment of the collieries, and of the nature of personal estate, to his executors, to be held and enjoyed with the collieries. These were carried on in copartnership. It was referred to the Master by Lord Rosslyn, to inquire which of the disputed articles were necessary for carrying on the mines—but the House of Lords held the reference to be wrong. It was also held by Lord Rosslyn, that money due from the fitters and others, and in the county bank, coals at the pit, and other articles, passed.

(*k*) Fletcher *v.* Stevenson, 3 Hare, 360; 13 L. J., N. S., C. C. 202.

(*l*) 3 Ves. 212; 11 Ves. 657; 1 Dowl. D. P. 73.

This decree was affirmed by Lord Eldon, L. C., with great doubt. It was considered that the money was part of the stock in trade used for producing profit. But it was held in the House of Lords, with the concurrence of Lord Eldon, that horses, hay, corn, &c., were not properly bygone profits, and therefore passed—but that the coals raised, the debts due to the concern, and money in the bank, did not pass, as they were not in their nature *things*, as that word was used in the will, but, rather, past profits. It was also held, that the fund which did not pass was applicable in the first place to the payment of the debts of the collieries; as the partnership had a specific lien on it for this purpose in preference to other creditors.

Such would appear to be the situation of an executor, when the mines are destined to devolve immediately for the benefit of persons taking permanent interests in the funds. But if, on the other hand, they are to form a property, or part of a fund, limited first to tenants for life, and then to persons in remainder, it is now clearly decided, not only that a tenant for life may call upon the executor or administrator to convert the property into the Three per cent. Consols—but that they will be personally liable for the consequences if they do not so convert it. For it might otherwise happen, that the persons in remainder could derive no benefit from the devise, by the entire exhaustion of the profits and property during the enjoyment of the tenant for life.

This principle of the Courts of Equity is of such universal application, that it is contained in every decree under such circumstances with respect to any wearing out funds, or any fund in which the tenant for life might have an advantage over those in remainder. It applies to all the public funds, except those invariably selected by the Courts for the investment of money, viz., the Three per cent. Consols (*m*).

(*m*) Howe *v.* Earl Dartmouth, 7 Ves. 150, and the cases cited in pp. 141, 142.

In a late case of importance, a testator gave the residue of his personal estate to trustees, with directions for them to convert and invest the proceeds in government or real securities, of which they were to stand possessed, upon trust for a tenant for life, with remainder over. The trustees permitted a share which the testator had in an Indian loan, bearing interest at 10*l.* per cent., to remain for several years unconverted, and paid, during that time, the whole of the interest to the tenant for life. The loan was afterwards paid off, and the money was invested in the Three per cents., at a time when the funds were so low that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death. It was held by Lord Gifford, that the tenant for life was not entitled to the actual interest which the money yielded on the Indian security, but only to the dividends of so much Three per cent. stock as would have been purchased with it at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received, and that they ought to be allowed in their discharge as payments to the tenant for life, not the sums actually paid to her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security and invested in the Three per cents. at the end of a year from the testator's death. Lord Lyndhurst, on appeal, confirmed this judgment (*n*).

The same principle will equally apply when there is no express direction in the testator's will for the conversion of his personal estate; for it has been held, that what the Court would decree, it will expect from an executor (*o*).

(*n*) Dimes *v.* Scott, 4 Russ. 195; Fearns *v.* Young, 9 Ves. 549; Caldecott *v.* Caldecott, 1 You. & C. 312; Douglas *v.* Congreve, 1 Keen, 410; Mills *v.* Mills, 7 Sim. 501; Meyer *v.* Simonson, 21 L. J., N. S., C. C. 678.

(*o*) Howe *v.* Earl Dartmouth, 7 Ves. 150.

If the conversion has not been effected at the time it ought to have been made, and the concern has been profitable, a trustee, though liable for loss, will not be allowed to derive any profit from the trust. Thus, a testator devised his residuary real and personal estate to trustees, upon trust at some convenient and proper period, with the approbation of his son, to sell, and, after conversion, to stand possessed of the proceeds for raising by mortgage, or out of the rents and proceeds, for his daughter, such annuity for her life as should be 200*l.* over and besides one-half of the income of the residue. But the income of the daughter above 600*l.*, if any, was given to the son. He declared that what he called interest and produce of his personal estates was not to be considered the income which was derived from the mines, but the profits of the mines, after deducting at least 10*l.* per cent. for wear and tear and plant; and, subject to the preceding bequests, he gave all his real and personal estates to his son—and directed that, on his son securing the bequests, he might be let into possession and management of the whole of the property. The trustees disclaimed, and the son proved the will, and alone acted in the affairs. The debts far exceeded the personal estate, exclusive of the colliery and some canal shares. The son applied the pure personalty in payment of the debts, and made up the deficiency out of his own money, keeping the debts alive for his own benefit. He did not convert the colliery, but he worked it at a large profit, after deducting 10*l.* per cent., till the end of the term for which it was held. On a bill being filed by the daughter for an account, and on appeal, it was held, that, upon the facts stated, it was the duty of the son, with all diligence after the death of the testator, to sell the whole of his convertible property, and that the capital of the testator's personal estate must have the benefit of the whole of the clear proceeds of the colliery, subject to reasonable allowance for expenditure to the same extent as if it had been properly carried on. Turner, L. J., said, the son was not a trustee,

but the personal estate was vested in him as executor. The gift to the trustees was of all the personal estate, but, that being in the son, the testator could not give to the trustees all the personal estate until the payment of debts; it was clear, therefore, that the gift to the trustees of all the personal estate was a gift to them of all the personal estate that remained after such payment. The personal estate could never reach the trustees till the debts were paid. The son, as executor, was bound to pay them before handing over the personal estate to the trustees; and the whole personal estate, therefore, according to the state of the assets of the testator, ought to have been converted, and the debts paid out of the proceeds. The son, however, did not make the conversion, but he assumed to deal with the property as a trustee before the trust arose, and the consequence was, that large profits were made from the mine. These were dealt with as if arising under the trust, but not properly, because the mine never came into the trusts till the debts were paid. The capital from which they arose never in truth belonged to the trust. That capital, and all the profits of it, ought to go back to the fund from which it was diverted—the general personal estate. If the colliery had property come into the trust, there would probably have been a right to enjoy *in specie* the profits of it, according to the directions of the will. But there was no specific bequest of the colliery, nothing was given to the trustees except all the personal estate. It was decreed accordingly (*p*). The decree was affirmed by the House of Lords (*q*).

In the case of Cranch *v.* Cranch (*r*) an inquiry was directed, whether it was for the benefit of the person entitled to the clear residue of the personal estate to have certain leasehold premises sold; and if it would be for

(*p*) Lord *v.* Wightwick, 2 Eq. R. 349; 23 L. J., N. S., C. C. 235.

(*q*) Wightwick *v.* Lord, 1 Drew. 576; De Gex, M. & G. 803; 26 L. J., Chanc. 825; 6 H. L. Cas. 217.

(*r*) Cited 7 Ves. 143.

their benefit, it was ordered that they should be sold, and that the money should be laid out in the Three per cents., the dividends to be paid to the tenant for life, with liberty to apply after her death; and the practice of the Court is stated by Lord Eldon to be, not to permit a real security to be called in without an inquiry whether it would be for the benefit of every person (*s*).

But in the case of working mines, there can be no reason for supposing that it would be necessary to apply to the Court for an inquiry to be made, or that the Court would not order the conversion to be made at once; for the above principle of law applies with greater force to mines than perhaps any other description of property. In such cases the interest is infinitely more variable and more perishable than many kinds of property which the Court has considered subject to conversion. A tenant for life might not only receive an annual sum far beyond the interest of the produce which would have resulted from a sale, but he might actually anticipate the whole fund reserved for those in remainder.

The proper time for conversion is stated by Lord Eldon in the case last cited. If, he observed, the principle was, that the Court, when its observation was thrown upon it, will order the conversion, it ought to be considered to all practicable purposes as converted, when it could be first converted; for no party ought to suffer by the circumstance, that what ought to have been done, and what the Court would have directed to be done immediately on the testator's death, was not done.

But this duty is not so imperative as to require an immediate sale. Even when property is directed by the testator himself to be sold, as soon as conveniently after his decease, or with all convenient speed, and the property is not sold, the value of the property will not be taken at the time of his death. In one case, Lord Eldon himself observed,

(*s*) Howe *v.* Lord Dartmouth, supra.

that if a fund is to be converted with all convenient speed, those words never required it to be sold the very next day. The Court was obliged to take a general rule, as it was impossible to make the inquiry in every particular case. The rule was, the end of a year after the death (*t*).

If, therefore, the property be not sold within the year, the value will be taken at the end of the year from the death of the testator, and the trustees will be responsible for a depreciation after that period. But whether the property be actually sold or not, within that time, the person entitled for life will acquire a right to the interest, calculated either upon the actual produce of sale within the year, or upon the actual produce or the assumed value at the end of a year from the death. If the conversion is actually effected within the year, this interest will accrue at any rate from that period. There has been some difference of opinion with respect to the interval between the death and the conversion. But it seems to be now almost settled that the person entitled for life will have, in the absence of contrary intention, a right to receive the proceeds of the unconverted fund, from the time of death to the time of conversion, if that period does not exceed one year, and the proceeds of the conversion from the time of the new investment (*u*).

It is sometimes stipulated in copartnership deeds for carrying on mines for a term of years, that the parties and their personal representatives shall not be allowed to alien their shares without leave from the other partners. The question then arises, when any of these shares are limited in the manner just mentioned, to a tenant for life, with remainder over, and that leave cannot be obtained, in what

(*t*) Gibson *v.* Bott, 7 Ves. 89. See also Sitwell *v.* Bernard, 6 Ves. 520; Mills *v.* Mills, supra.

(*u*) Dimes *v.* Scott, Douglas *v.* Congreve, supra; Angerstein *v.* Martin, Turn. & Russ. 232; Hewitt *v.* Morris, ibid. 241; La Terrière *v.* Bulmer, 2 Sim. 18; Taylor *v.* Clarke, 1 Hare, 161; 11 L. J., N. S., C. C. 189.

manner the tenant for life is to be precluded from the possibility of exhausting the fund? It does not appear that there is any ground of distinction from ordinary cases, except, indeed, that the value of the property cannot be tested by an actual sale. Recourse must, therefore, be had to valuation by competent persons. It is often very difficult to estimate the proper value of mining property. The adventure may be crowned with success, or its prospects may be blasted by the experience of a day. This difficulty would be seriously increased if a valuation were required to be made with reference to some remote period. Every thing, however, has its supposed value, though that value may differ most materially from its real worth. The law acts upon general rules; there is, in this instance, the same necessity for the exercise of the rule; and if recourse cannot be had to the best of all tests of value, viz., an actual sale, yet this does not preclude an approximation to the value by other means. In cases where no sale is effected for a considerable period, the interest payable to the tenant for life, as we have seen, must be calculated with reference to the same mode. In the case of Gibson *v.* Bott (*v*), the Court directed that, as it was for the interest of all parties that the leasehold property should not be sold, a value should be set upon them; and the persons entitled for life should have interest at four per cent. upon that value. In like manner, when an actual sale cannot be resorted to, as in the case we are discussing, a valuation must be made by competent persons, and interest allowed upon the amount. This valuation may be made at any time within a year from the death of the testator; but in the case of property liable to considerable fluctuation, to prevent disputes, it might be advisable to postpone the valuation till the end of the year (*w*).

It will be seen afterwards, that in cases of partnership,

(*v*) 7 Ves. 89.

(*w*) See Dimes *v.* Scott, supra.

mines held for freehold interests in certain cases, on the death of an owner, will be classed amongst the personal property of the firm, and be transmissible accordingly.

In a case, where a testator, before the new Wills Act, devised an estate, except the pits and veins of clay therein, and in another part of the will devised the pits and veins of clay in and upon his lands to different uses, it was held that the latter devise passed only the pits and veins of clay which were in work at the date of the will under a lease mentioned in the decree (*x*). But it is considered by Lord St. Leonards, that under the provisions of the new act such a devise would pass all the pits and veins opened by the testator after the date of his will (*y*).

A testator devised to his brother certain collieries absolutely, and all debts due to the testator in respect of the collieries at the time of his decease, but subject to all debts and engagements in connection with them. He also gave his brother a large sum for enabling him to carry them on. Shortly before his decease, the testator sold them to his brother. It was held, that there was no ademption of the legacy, and that the direction as to debts only failed (*z*).

Another testator devised all his property in the county of N., where he possessed collieries. It was held, that the debts due to him in respect of the collieries passed under the will (*a*).

It is provided by the Duties Succession Act, that the yearly value of any *opened* mine, or other real property of a fluctuating yearly income, shall either be calculated on the average net profits, during a period of years to be agreed upon between the commissioners and the suc-

(*x*) Brown *v.* Whiteway, 8 Hare, 150.

(*y*) Real Prop. Stat. 366.

(*z*) Parsons *v.* Coke, 4 Drew. 296; 27 L. J., Chanc. 828.

(*a*) Tyrone (Earl) *v.* Waterford (Marquis), 29 L. J., Chanc. 486; 1 De Gex, F. & J. 613.

cessor; or, in default of agreement, then the principal value shall be ascertained, and the annual value shall be considered to be equal to interest at 3*l.* per cent. per annum on that amount (*b*). The annual value is the present actual annual value, and not any prospective or possible annual value arising from mining works (*c*).

Section IV.

BY OPERATION OF LAW.

It is scarcely necessary to say that mines, like other kinds of real property, are subject to the usual laws of descent, devolution, and transfer, by act of law, according to the freehold or chattel interest acquired in them. We shall, therefore, only have occasion, in this section, to notice any peculiarities which may attend some cases of transfer by act of law.

Mines held in fee, which are opened, are liable to dower. Dower should be assigned within forty days after the death of the husband, and an actual estate in dower does not arise till assignment by the sheriff or the tenant.

It has been held, however, that a widow is not entitled to dower in respect of mines which have not been opened (*d*). The reasons for this decision are not recorded, but they may be presumed to consist in the uncertain nature of the property, and the impracticability of effecting an assignment.

There is no difference in the liability of mines forming a separate inheritance (*e*).

In the case just cited, the Court was of opinion that the widow was dowable of all mines of the deceased husband, as well those in his own landed estates, as those in the

(*b*) 16 & 17 Vict. c. 51, s. 26.
(*c*) Attorney-Gen. *v.* Sefton (Earl), 32 L. J., Exch. 230; 34 Ibid. 98.
(*d*) Stoughton *v.* Leigh, 1 Taunt. 410.
(*e*) 1 Taunt. 410.

lands of other persons, which had been wrought or opened before his death, and wherein he had an estate of inheritance, and that her right to dower had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband, or those claiming under him.

It was also held, that this right of dower could not be affected by leases made by the husband during coverture; but if any of the existing leases for years were made by the husband before marriage, then the endowment must be of the reversions and the rents reserved; in which case the widow would be bound, so long as the demises continued, to take her share of the renders, whether pecuniary or otherwise, according to the terms of reservation.

Dower may be assigned by parol, notwithstanding the Statute of Frauds, for her estate is not created but only ascertained by assignment; and when she has entered, after assignment, the freehold rests in her without livery of seisin (*f*), whether the assignment has been accomplished by agreement, or by the course of law.

Dower may be assigned by mutual agreement between the owner of the freehold and the widow, and her acceptance of the provision by indenture will preclude her from asserting any further claim (*g*). But if her dower be refused to her, she may proceed either by writ of dower, at common law, or in equity by a bill for an assignment. In the former case, if her right is established, the sheriff is then directed to make the assignment; and in the latter case, a commission usually issues for the same purpose, or the master may be directed to assign it (*h*). But the modes of proceeding, though varying in form, are substantially the same, with respect to the principle of assignment.

It is not necessary that the widow should have a third or other proportion of each part of the husband's estates.

(*f*) Co. Litt. 32 b, n. 1, 34 a, 35 a; Rowe *v.* Power, 2 N. R. 134.

(*g*) Dyer, 91 b, pl. 12.

(*h*) Goodenough *v.* Goodenough, 2 Dick. 795.

Thus, it has been held, that if the husband be possessed of several different mines, it is not necessary that the sheriff should divide each of them; but he may assign such a number of them as may amount to one-third in value of the whole (*i*).

But when there is but one mine, or if it is not desirable to assign some in discharge of the whole, it is obvious that the ordinary mode of assignment by metes and bounds is impracticable, and some other means must be resorted to for determining the estate of the dowress. The following distinctions have been recognized:—

If the mines are within the lands of the husband, the sheriff must estimate the annual value; but he need not assign to her any of the mines themselves, or any part of them; the widow's part may consist wholly of lands set out by metes and bounds, in which are some of the mines. But he may, if he chooses, include any of the mines or minerals in the assignment; and if the lands in which they are form no part of the lands assigned for dower, the mines should be specifically described; if, however, the mines assigned be included in the lands set out in dower, it is not necessary to particularize them, as they are parts of the lands assigned. But the sheriff may not adopt any of these methods; he may divide the enjoyment and perception of the profits of the mines between the parties, viz., by directing the separate alternate enjoyment of the whole for short periods, proportioned to the share each party had in the subject, or by giving to the widow an adequate part of the profits (*j*).

If, again, the mines subject to dower are in the lands of other persons, the sheriff need not divide each of the mines; but he may assign such a number of them as may amount to one-third in value of the whole, or he may proportion the enjoyment of them in such a manner as to give each person a proper share of the whole (*k*).

(*i*) Stoughton *v.* Leigh, 1 Taunt. 411. See 9 Vin. Ab. 257, 260.

(*j*) Stoughton *v.* Leigh, supra.

(*k*) Ibid.

It would be to enter too minutely into the subject to discuss the remedies for excessive or defective assignments (*l*). It may be observed, however, that when the assignment is made by the heir of full age and under no disability, and not by the sheriff, the heir will be bound by the assignment, although it exceeded the widow's part of the estate; for it is the act of a person *sui juris*, and uncontrolled in the distribution of his estate (*m*). But a Court of Equity, it is presumed, would relieve the heir against the consequences not only of fraud, but of evident mistake.

In the case of Stoughton *v.* Leigh, just cited, it appeared that the heir, being of full age, let his ancestor's widow into possession of, and assigned to her for dower of a certain estate, certain closes of land, in which there was an open coal mine wrought at times during the marriage, but which had been discontinued long before the husband's death. The value of the closes was amply sufficient to answer any demand of dower, without regard to the value of any of the coal. The question was, whether the heir had any and what relief in respect to the excess of his own assignment. It was held, that, since the assignment was the act of the heir himself, he being of full age at the time, he had no remedy at law against the dowress for avoiding the consequences of that act, and that the dowress was at full liberty to work the mine, notwithstanding the excess of assignment.

But if the heir making an excessive assignment was only an heir in tail, it is presumed those in remainder would not be bound by his acts.

An infant heir may assign dower, for the widow's claim is urgent, and necessary for her immediate support (*n*). However, in consequence of his disability, the law protects

(*l*) See Roper on Husband and Wife, chap. 9, sect. 3.

(*m*) Gilb. Dower, 380.

(*n*) 1 Roll. Abr. 137, 681; Gore *v.* Perdue, Cro. Eliz. 309.

him against the consequences of an excessive assignment, and he may, even before he arrives at full age, be supplied with the writ of admeasurement, which is addressed to the sheriff, and which directs him to make the admeasurement finally (*o*).

It has been doubted, whether, if an open mine of coals or lead were in the share assigned by the infant heir, so as to render the widow's third of greater value than the remaining two-thirds, a writ of admeasurement would lie (*p*). It is difficult to conceive, in the case of an open mine not taken into the estimation, any ground of distinction from an ordinary case of excessive assignment; and it is presumed, there can be no doubt in such a case. But if the value of the mine had been taken into account, and its prospects, though since improved, were then such as to make no material distinction in the actual apportionment, it might, of course, be contended that there was no reason why the writ should be issued. It is presumed, the value must be taken at the time of the assignment, and the heir would not be entitled to the writ if the value had increased since the assignment, for the writ is given to correct errors and unfair dealings; and the assignment might be perfectly fair at the time it was made. All such questions may be brought by either party before the judges of the Court of Common Pleas, who will direct the removal of the writ, and proceed to make the proper admeasurement (*q*).

It is stated by Fitzherbert, that, if the lands assigned by the infant heir exceed one-third of the whole, and they become more valuable than the remainder, by improvements made by the widow, a writ of admeasurement will not lie on account of such improvements, as that would be unjust, since she may have been induced to make them under a presumption that the assignment was proper (*r*).

(*o*) Fitz. N. B. 149, B.; Gilb. Dower, 385; but see Co. Litt. 39; 2 Inst. 367.

(*p*) Fitz. N. B. 149, C.

(*q*) Fitz. N. B. 148, G. H.; Gilb. Dower, 385.

(*r*) Fitz. N. B. 149, C.

It has been suggested, that there seems no objection to the admeasurement of the lands assigned, and to the heir taking the overplus, upon allowing for the value of the improvements of the excess of lands assigned. Thus, if the assignment were of four acres when the number should have been three, the heir might take back the fourth upon the admeasurement, and make compensation to the widow for the value of its improvement (*s*). But it does not appear clear that the sheriff or the Court of Common Pleas have the power under the writ of awarding compensation, in such cases, to the widow. If this be the case, relief must be sought for in a court of equity, which would probably either put the parties to elect between the acceptance of certain terms, or a new assignment on the basis of the improvements (*t*).

To what extent such a principle might be held to apply to mines, it would be impossible to say. If the dowress had been successful in converting her expenditure into a source of profit, there seems no reason why such a rule should not be made available in her favour. But in other instances, it is conceived, the uncertain nature of mining speculations would preclude her from demanding any amount of compensation.

It has been decided, that when dower has been sued for at law, and a partial or improper return has been made by the sheriff, the heir or tenant may be relieved in equity. Thus, a suit was brought for relief against a fraudulent assignment of the sheriff, who had given to the widow a full third part in which there was a coal mine of considerable annual value, but in respect of which no consideration was had in the assignment. The Court proposed terms for the consideration and acceptance of the widow, and directed, if they were not accepted, that a new assignment of dower should be made (*u*).

(*s*) Roper on Husband and Wife, vol. i. p. 409.

(*t*) Hoby *v.* Hoby, 1 Vern. 218.

(*u*) Hoby *v.* Hoby, 1 Vern. 218; 2 Ch. Cas. 160. See also Sneyd *v.* Sneyd, 1 Atk. 442.

A widow will also be entitled to dower when there is a licence or liberty in fee to work mines. Although this liberty only forms an incorporeal hereditament, yet it savours of the realty sufficiently to become liable to dower (*v*).

Mines, of course, may also descend in coparcenary.

The case of Lord Mountjoy (*x*) is the only one which seems to refer to this subject. In that case there was only a right to work mines, which was not *exclusive*, and it appears to have been held that such a right, descending in coparcenary, was incapable of division, and that the coparceners should continue to work the mines with one stock, participating equally in the expenditure and the profits.

It has been observed, that from the report of the case by Anderson it appears that this was a mere dictum, either of some of the judges, or of the other reporters. For this point of indivisibility is not noticed in his report, which gives the opinion of the judges as it was certified in writing to the privy council; nor is it one of the questions stated by him to have been referred to the judges (*y*).

This dictum, however, meets with the approbation of Sir Edward Coke, and there does not seem to be any reason for disputing it. After citing the case, Coke proceeds to say, that then it might be demanded what should become of these inheritances? — The answer is, that it appeared that regularly the eldest should have the indivisible inheritance, and the rest should have a contribution, that is, an allowance of the value in some other of the inheritance. But what if the common ancestor left no other inheritance to give anything in allowance, what contribution or recompense should the younger coparceners have? —It is answered, that one coparcener shall have the sub-

(*v*) Co. Litt. 32 a, 32 b; Cro. Jac. 621; Fitz. N. B, 148 c.

(*x*) Godb. 17; 1 And. 307; Mo. 174.

(*y*) See Co. Litt. 165 a, n. 1.

ject matter for a time, and the other for a like time—as the one for one year, and the other for another, or more, or lesser time, *whereby no prejudice could grow to the owner of the soil* (*z*).

The mere right to work mines is, as we have seen, an incorporeal hereditament existing in the land of other persons; and, when it does not give an exclusive dominion, it is indivisible, because a division of the right would create new rights, and would prejudice the owner of the soil. All the coparceners cannot exercise the full right. This is the true reason why the enjoyment of coparceners must be distributed with respect to time, or limited to acts proceeding from a union of interests.—Such is the law with respect to estovers, appendant to a freehold, a right of piscary uncertain, and common sans nombre, in all which and similar cases a partition would enlarge the original grant beyond the intention of the grantor (*a*).

But if the right or licence to work mines be exclusive of similar rights, not only on the part of the owner of the lands, but of all other persons, and it is manifest that the owners of the right have entire power to take away the whole subject matter (*b*), the above rule will not apply. Although this point has never called for judicial discussion, it is presumed that an actual partition might take place in the same manner as if the coparceners had an estate of inheritance in the minerals, as land. In the latter case, there can be no doubt that, in analogy to what has been decided with respect to dower in mines, coparceners would be also held to be entitled to a partition. Their rights, in these cases, have no such interference with the property of others—and their estate is, in its nature, capable of division.

It is presumed, therefore, that mines thus held, and whether forming a distinct inheritance or not, may be divided amongst any number of co-heiresses under a

(*z*) Co. Litt. 165 a.
(*a*) Co. Litt 32 a; Godb. 21; Perk. sect. 341.
(*b*) See Chap. VIII.

commission issuing from the Court of Chancery. The writ of partition is now abolished. If there are other hereditaments or many mines, each coparcener may be entitled to a distinct and separate estate either in any of the mines or in other hereditaments, or in both, according to the circumstances of the case. If the property consist only of mines, and these are incapable of convenient and separate partition, the proper proceedings might easily be suggested by reference to the mode of partition in a case of a similar nature, or of assignment of dower. It is unnecessary to add, that coparceners may also, when competent, agree to any special enjoyment, by way of demise, or partition in the usual way (*b*).

Similar observations apply to joint tenants and tenants in common.

In a case under a will, an estate was divisible among twelve persons, some of whom were infants. Mines of coal and ironstone were worked in one close, and might exist in other parts. The testator was entitled to all the ironstone, but only to two-thirds of the coal. It was shown that a sale would be best for all parties, instead of a partition; and the Court ordered a sale (*c*).

In a deed of voluntary partition, where the mines and minerals were excepted, it was held, that the word *minerals* was used in a limited sense, and, therefore, did not comprise limestone worked in quarries (*d*).

Mines, when held for chattel interests, will vest in administrators, in cases of intestacy, and whether held for freehold or chattel interests, will also vest in the assignees of the estates of bankrupts and insolvents. They will also be subject to the ordinary processes of executions on judgment. By the law of Scotland, all terms of years in real estate are heritable, and descend to the heir, unless he is expressly excluded in the form of destination.

Under the third section of the Statute of Frauds, existing

(*b*) See Bac. Ab. Coparc. C.

(*c*) Rickards *v.* Rickards, 36 L. J., Chanc. 176.

(*d*) Davvell *v.* Roper, 3 Drew. 294; 24 L. J., Ch. 779. See Bell *v.* Wilson, 2 Dr. & Sm. 395; 34 L. J., Ch. 572; 35 Ib. 337.

interests in land may still be assigned and surrendered by act and operation of law.

Thus, if, during a lease from year to year, the landlord, with the assent of the tenant who quits the premises, accept and treat a third person as his tenant, this will amount to a valid surrender of the former tenant's interest by operation of law (*e*). The acceptance of a new lease for a term, to commence during the existence of a former demise, amounts to a surrender of the first term (*f*).

Section V.

TRANSFER OF SHARES.

In cases of joint ownership and of partnership in mines, it usually happens that the interest in the property is legally vested in one or more proprietors in trust for themselves and the rest of the company.

When the property is thus vested, the existence of the trust may be shown by any written evidence or admission of the parties which may suffice to establish the fact, and a bill in equity may be filed for the discovery of the trust.—But when the adventure is of any consequence, there should either be a conveyance of the property to the other proprietors in the shares to which they are entitled, or the trust should be declared by the trustees in a regular deed, in which should be expressed the respective interests of all parties interested in the property at the time of the execution. It will be seen, in a subsequent part of this treatise, that it is of great importance that the objects of a mining company should be fully developed in a deed of copartnership, by which the partners may prevent many of the legal and troublesome consequences arising from such connections (*g*). It is not unusual to effect both purposes by the

(*e*) Thomas *v.* Cook, 2 B. & Ald. 119; Phipps *v.* Sculthorpe, 1 B. & Ald. 50.

(*f*) Hamerton *v.* Stead, 3 Barn. & C. 478; 5 D. & R. 206; and see Woodfall on Landlord and Tenant, by Harr. c. vii. s. 3.

(*g*) See Chap. VIII.

same instrument (*h*). It may occasionally be sufficiently proper to include the stipulations of partnership in the deed of grant itself.

If the mines are held for a freehold interest, the cestuis que trust will, of course, be entitled to an equitable freehold; and if only for terms of years, they will be entitled only to an equitable chattel interest. If, again, the property is held under a mere agreement, all the parties interested will stand merely in a similar condition, and will be equally entitled to equitable interests only, either of a freehold or personal nature. In all these cases, the shares of the cestuis que trust would be effectually bound by any written memorandum or agreement for transfer, which would, in equity, affect the legal estate, and control its disposition. In some cases, as where the adventure is of trifling importance, or when the period of enjoyment is very limited, it may be sufficiently prudent to dispense with any further means of security. But it will generally be most advisable to transfer the shares by an indenture of equitable grant or assignment, by which the conveying parties may be clearly estopped from asserting subsequent claims, and may enter into proper covenants with the persons acquiring the shares (*i*).

Notice of transfer should be immediately given to the trustees. This is often effected by the entry of the names of new partners upon the books of the concern, and recognition by their copartners. But if the trustees are not partners, express notice should be given.

If the person transferring the shares be one in whose name the property is held, and he disposes of his whole interest, it may be proper that he should also divest himself of all legal and equitable title to the general property as well as to the particular shares. This object may be attained in the manner already pointed out in the preceding sections. If there be only an agreement for the mining property, no further conveyance than that of the shares can, of course, be obtained.

(*h*) See Appendix. (*i*) See Appendix.

These observations will apply equally to licences either for freehold or chattel interests.

It is almost unnecessary to say that the shares will follow the course of devolution and descent, and be subject to the usual incidents of real property, according to the nature of the tenure. Equity follows the law.

But a distinction has lately been made with respect to the transfer of shares in joint-stock mining companies, which, if it does not amount to a violation of the Statute of Frauds, at least proves another great omission in that statute. For it could never have been contemplated by the legislature that passed that act, that property of this kind, of enormous aggregate value, was not within some of its provisions. It is quite clear that these shares are not within the seventeenth section, which applies to goods.

In a case of this kind in Ireland, the Chief Justice of the Court of King's Bench said, that the evidence given on the trial by the secretary was conclusive, as to the purchase and renting of many mines in different parts; that the shares were transferable, and a purchase of one of them would acquire, in the dissolution of the company, a share in the interests in land which it had acquired (*k*).

But this decision has not been accepted as correct. Several recent cases have decided, that shares in incorporated companies concerned in the enjoyment of land are not within the old Statute of Wills or the Statute of Mortmain, and may, therefore, be devised as personal estate. Thus it has been held, that shares in water companies (*l*), railway shares (*m*), shares in public docks (*n*), shares in gas companies (*o*), and joint-stock bank shares (*p*),

(*k*) Boyce *v.* Green, Batty, 608. See also Vice *v.* Lady Anson, 7 B. & C. 409; 1 M. & R. 113.

(*l*) Bligh *v.* Brent, 2 You. & C. 268.

(*m*) Dancroft *v.* Albrecht, 12 Sim. 189; Hayter *v.* Tucker, 4 Kay & J. 243.

(*n*) Hilton *v.* Giraud, 1 De G. & Sm. 187; 16 L. J., Ch. 285.

(*o*) Sparling *v.* Parker, 9 Beav. 450.

(*p*) Myers *v.* Perigal, 11 Com. B. Rep. 90; 21 L. J., N. S., C. P. 217; 22 L. J., N. S., C. P. 431.

are within this rule. But shares in an iron company, who manufactured iron procured from their own lands, were held to be within the Statute of Mortmain (*q*).

It has been expressly decided, that shares of mines held on the "cost-book principle" may also be transferred by parol, and that there is no distinction in this respect between incorporated and unincorporated companies. Cost-book companies will be afterwards considered in treating of partnership. It may be here briefly stated, that the mines are usually held in the name of a trustee, either by way of lease or licence; that each shareholder may sell his share, and insist on the purchaser becoming a partner, and that the sale and transfer of a share is shown by an unstamped certificate, signed by the vendor, with an acceptance undersigned by the purchaser, on which authority the manager of the mine substitutes the name of the latter for that of the former in the cost-book. Such a mode of transfer, which is merely evidence of a parol contract, would not satisfy the Statute of Frauds. But it has been held, that such shares are not within the statute (*r*).

All these decisions are supposed to rest on the same reasons. It is considered, that the land is acquired only as the necessary substratum or platform for carrying on a trade, and is not held on any specific trusts for the copartners, as land; that the shares are entirely equitable interests, held indeed for the time in trust for all the copartners, yet never disconnected with the above purpose, giving only the present right to profits arising from the joint trade stock of which the land is part, but no separate interest in the land or stock itself, and subject, therefore, to no claim for immediate division or partition; that the land never loses the quality of stock or personal

(*q*) Morris *v.* Glynn, 27 Beav. 218.

(*r*) Watson *v.* Spratley, 10 Exch. Rep. 222; 24 L. J., Exch. 53; Reynolds *v.* Bassett, MS., May 30, 1847; Powell *v.* Jessop, 25 L. J., C. P. 199; 18 Com. B. 336; Edwards *v.* Hall, 25 L. J., Ch. 82; 6 De G., M. & G. 74; 11 Hare, 6; Marshall *v.* Brown, 7 M. & S. 193.

estate, and if held for a freehold interest would not descend to the heir, but would devolve to the personal representative; and, lastly, that, on a dissolution of the company, the shareholders would not be entitled, even then, to a division of land or stock, but only to a participation of the proceeds of sale. If the partners acquired the lands in final partition, or if one partner thus absorbed the whole, this would in either case be accomplished on the basis of a new arrangement, and even then the land might be elected to be taken as real or personal estate (*s*).

All these reasons are stated to apply as well to the smallest joint-stock partnerships, as to the largest incorporated companies. If the above decision be correct, it will be difficult to make any distinction with respect to many private partnerships. All partnerships for trade, however small, are in the nature of joint-stock companies; and these cost-book companies are in fact only ordinary partnerships, extended as to number of partners, and modified, as all others may be, by stipulations which are not contrary to the general law. The *delectus personæ* may be dispensed with in limited partnerships, and, if not, it cannot be said to affect materially the present question of proprietorship. It is quite clear that most of the above reasons are quite applicable to private trade partnerships. The ground mainly relied on seems to be, that the land is not directly held in trust for the adventurers in proportion to their shares; and if not so held, it is held as pure personal estate. This is precisely the state in which it is held in all private mining partnerships, where the mines are vested in trustees for the benefit of the firm; and it retains this quality down to the very period of dissolution. When that time arrives, the universal result is a sale of the whole property. There may be exemptions from those consequences; as when a mine is clearly carried on by proprietors as tenants in common of land, in which

(*s*) Myers *v.* Perigal, 22 L. J., N. S., C. C. 431; 2 De G., M. & G. 599.

case, as will be afterwards seen, there is no trade (*t*); and also in rare cases, where it has been expressly and *previously* stipulated that the property shall be held *in specie*, and be finally divided amongst the partners without resorting to a sale. The distinction seems to be very slight between the above case and cases of express trusts for partners declared by deed. Such a trust may be implied by other means, and a deed is, in fact, only a superior kind of evidence. The land is not the less considered to be personal estate embarked in trade. Neither can it, in any event, cease to be land in its immediate incidents. These results do not depend on the number of partners, when the partnership is left to the ordinary rules of law. The question is, whether there is established, with respect to the *land*, in any case, the distinct present relation of trustee and cestui que trust. The distinction in partnerships existing as incorporated companies is, that the shareholders are quite distinct from the corporation in which the lands are vested, and that the lands may be purchased and sold by a selected number without the concurrence of the general body of proprietors. Such also is the condition of those unincorporated joint-stock companies, who have given the same distinct powers to directors or trustees. In these cases, the body of partners never have any interest in the land, as land. The same distinction would apply to ordinary trustees in the smallest concerns, if they had the same absolute powers. But in none of the cases now under consideration does this power generally exist. In such cases, when sales and purchases, or leases of mines or land, are effected, these acts are accomplished by unanimous concurrence or acquiescence, or by some stipulated majority of votes equally expressing the will of all the proprietors, or by virtue of some new constitution of partnership. It is expressly stated that cost-book companies are distinguished from other joint-stock companies,

(*t*) See Chap. X.

by reserving the whole power of direction to the whole of the shareholders, and that the person or trustee is merely an agent for a limited period, and of course with limited powers. It would seem, therefore, either that this step should be retraced, or that a further advance should be made, by declaring that the transfer of all shares held as personal estate is excluded from the Statute of Frauds.

By the rules of a mining company, established on the cost-book principle, the registered owner of shares was subject to calls made, so long as he remained registered in the cost-book. An owner sold his shares, and delivered to the purchaser a document addressed to the secretary, requesting him to enter in the cost-book a transfer of the shares sold into a name which was left blank. The purchaser did not cause the shares to be registered at all, and the vendor was compelled to pay calls made on the shares after the agreement for sale. It was held, that the purchaser was not bound to cause the shares to be registered, as there was an implied intention to give the purchaser a power of transfer to any other person, but, that there was also an implied contract by the purchaser to indemnify the vendor against the consequences of his name having been retained on the register (*u*).

In another case of cost-book mines, a shareholder transferred his shares by deed to a trustee for himself, on the express understanding that the trustee was not to be responsible for calls, and that the transfer was not to be registered unless the shareholder went abroad. The company were ignorant of the understanding. The shareholder did not go abroad, but he caused the transfer to be registered, without the knowledge of the trustee. It was held, that the trustee was not made liable as a shareholder to the creditors of the company (*v*).

In another case, a resolution had been passed that a

(*u*) Walker *v.* Bartlett, 17 Com. B. 446; 18 Ib. 845; 25 L. J., C. P. 156; (error) Ib. 263.

(*v*) Thomas *v.* Clark, 18 Com. B. 662; 25 L. J., C. P. 309.

shareholder in arrear, who surrendered his shares, might, within a month, redeem so many shares as, at a certain amount per share, would equal the amount paid by him, on condition of paying another call then made on the redeemed shares. Three shareholders surrendered their shares in the usual form, and sent the documents to the secretary. They took no steps to redeem the shares, and did not pay the new call. Four months afterwards, the secretary wrote to them, stating that their shares had been reduced, and demanding the call and also other calls. One of the shareholders replied with a request that his shares might be further reduced, as it was inconvenient to pay the calls. It was held, on winding up the affairs of the company, that the shares were legally surrendered, that the reply of the shareholder was written under an erroneous idea of his position as to the shares, that all right under the resolution was gone, that he was not a shareholder at that time, and that none of them were entitled to redeem, nor liable to be put on the list of contributories (*w*).

In an action for not accepting and paying for shares, evidence is admissible to show the existence of a usage among brokers in mining shares, that in contracts of that kind, the delivery of the shares should take place at the same time as the payment (*x*).

In an attachment issued by the Lord Mayor's Court, of London, it is no ground for prohibition by a superior Court, that the attachment had the effect of preventing the due registration by a garnishee of the transfer of mining shares sold to an applicant by a debtor (*y*).

Certificates of shares held by a bankrupt, in secret trust for another person, are held to be within his reputed

(*w*) In re The Bodmin United Mines, 23 Beav. 370; 26 L. J., Ch. 570.

(*x*) Field *v.* Lelean, 6 H. & N. 617; 30 L. J., Exch. 168.

(*y*) Tredinnick *v.* Oliver, Ex parte Bill, 29 L. J., Exch. 466; 5 Hurl. & N. 780.

ownership (*z*). But there is no reputed ownership on the transfer of certificates, when they contain a printed notice that no transfer can be made without the consent of the directors (*a*).

A bankrupt, who had deposited certificates of shares in a German mining company for securing a loan, with a written agreement for the completion of the transfer, was allowed to retain all the documents in a sealed parcel for safe custody. It was held, that the shares were not in his order or disposition (*b*).

In an action of debt against a shareholder for goods supplied for a cost-book mine, there was tendered a certificate of transfer by a certain deed, undersigned by the defendant, who thus accepted the shares, subject to the rules of the company. It was held, that the document, which was stamped as an agreement, did not require a transfer stamp, but was admissible as proof of a transfer, capable of being rebutted by contrary evidence (*c*).

Section VI.

MINING IMPLEMENTS AND MACHINERY.

The implements, tools, and moveable goods, employed for mining purposes, will not be transferred together with the property in the mines, or the right to work them. These form an independent personal property, and must, if required, be the subject of special contract or arrangement (*d*).

A different rule, however, may apply to the machinery which is annexed to the freehold, and which are usually

(*z*) Ex parte Watkins, 2 M. & Ay. 348.

(*a*) Ex parte Harrison, 3 M. & Ay. 506.

(*b*) Ex parte Richardson, 3 Dea. 496. See also Morris *v.* Cannan, 31 L. J., Ch. 425.

(*c*) Toll *v.* Lee, 4 Exch. 230; 18 L. J., N. S., Exch. 364.

(*d*) Fisher *v.* Dixon, 12 Cl. & Fin. 312.

called *fixtures*. When an article is so annexed to the land that the soil must be displaced for removing it, or when the article is cemented or otherwise fastened to some fabric previously attached to the ground, it will be considered to form part of the realty, and to partake of all the properties and incidents of land (*e*). Thus, a verandah, the lower part of which was attached to posts in the ground, was held to become annexed to the land (*f*). On the other hand, a barn erected and put upon pattens and blocks of timber lying upon the ground, but not fixed in or to the ground, a post windmill constructed upon cross traces, laid upon brick pillars but not attached or fixed thereto, were held to be mere chattels not attached to the freehold (*g*).

When articles are thus considered as annexed to, and forming part of, the freehold, it remains to be seen in what cases they may be severed from it, and be again reduced into the condition of mere personal chattels. According to the old law, there could have been no severance at all after such an annexation. But the liberality of modern times has introduced, for the benefit of trade and for general convenience, a considerable modification of the old doctrines on this subject. This relaxation will, however, much depend upon the relative interests and situations of the parties.

I. We may first consider the case of mining fixtures as between an executor or administrator, and the heir. In such cases, the mines must, of course, be considered to have been held by the deceased in fee or for a descendible freehold interest. The first instance in which the old rule was departed from was in the case of a cider mill, where it was held by Comyns, C. B., at *nisi prius*, that though the mill was deep in the ground, and affixed to the freehold,

(*e*) Dudley *v.* Warde, Amb. 113; Elwes *v.* Mawe, 3 East, 51.

(*f*) Penry *v.* Brown, 2 Stark. 403.

(*g*) Culling *v.* Tuffnal, Bull. N. P. 34; R. *v.* Londonthorpe, 6 T. R. 377. See also Nayler *v.* Collinge, 1 Taunt. 21.

it was still personal estate, and the jury were directed to find for the executor (*h*). This case is recognised both by Lord Hardwicke (*i*) and Lord Ellenborough (*k*). The former is also reported to have observed, that it would be very hard that the fire engines of a colliery should, in every instance, go to the heir (*l*).

The grounds for the above decision were, that the owner in fee had erected the cider mill for the purposes of trade. It will be seen presently (*m*), that mining is undoubtedly a species of trade, but it has also been described by Lord Hardwicke, with reference, also, to the present subject, as a mixed case between enjoying the profits of the land, and carrying on a species of trade (*n*). Now, the manufacture of cider, in the above case, was also a kind of trade, but not necessarily connected with the enjoyment of land. The produce of the land might have been sold. The mill and machinery were not absolutely required for taking the profits of the land. In mining this is different. The minerals constitute part of the profits of the land, and machinery is often necessary for extracting those profits. It is employed for such purposes only. This machinery must not be confounded with that used in those processes which, like the cider mill, are not strictly required for the acquisition of the profits. The above case, therefore, does not apply to mining adventures, and it may be asserted, that when the lands descend to the heir, he will also be entitled to the machinery which has been annexed to the freehold, and become part of the inheritance.

Thus, an action of trover was brought by an executor against the tenant of the heir at law to recover certain vessels used in salt works, called salt pans, which were fixed with mortar to a brick floor. Lord Mansfield, after observing that the strict rule had been relaxed in certain

(*h*) Cited 3 Atk. 14.
(*i*) 3 Atk. 16; Amb. 114.
(*k*) 3 East, 54.
(*l*) 3 Atk. 15. See Mather *v.* Fraser, 25 L. J., Ch. 361.
(*m*) See also Chap. X.
(*n*) 3 Atk. 16.

cases, said, he could not find that between heir and executor there had been any relaxation of this sort, except in the case of the cider mill, which was not printed at large. The salt spring was a valuable inheritance, but no profit arose from it, unless there was a salt work. The owner erected the works for the benefit of the inheritance, and they must go to the heir (*o*).

In Lowther *v.* Cavendish (*p*), a reference was made to the master to inquire whether the timber and other materials laid down for waggon-ways, and also fire engines, were reputed in Cumberland, and in the north, fixed to the freehold, and passed to the heir or the executor.

A different rule might perhaps be held to apply to the case of an heir succeeding only to a licence to work mines. In this case, he can claim no estate in the lands, and it might be contended, that he could not claim what is fixed to the land of another, however necessary the works might be to the enjoyment of his right. But he has an *interest* in land, and a liberal construction would probably prevail.

The devisee of an owner in fee will be in the same situation with respect to fixtures as the heir, unless the testator has expressed some different intention. This intention may also be deduced from the nature and condition of the property devised (*q*).

When the corpus of the machinery belongs to the heir, he is also entitled to all the parts, capable of being used in a detached state, if they really belong to it (*r*).

II. We may next consider the rights of the executor of tenants for life or in tail against those in remainder or reversion. These rights will be found to be much more extensive than those of an executor of tenants in fee.

In a leading case on this subject, a fire engine had been

(*o*) Lawton *v.* Salmon, 1 H. Black. 259.

(*p*) 1 Eden, 99.

(*q*) Wood *v.* Gaynon, 1 Amb. 395. See Lushington *v.* Sewell, 1 Sim. 435.

(*r*) Fisher *v.* Dixon, supra.

set up for working a colliery by a tenant for life. It was proved, that it was customary to remove such works, and that in building sheds for securing the engine, holes were left for the ends of timber, to make it more commodious for removal. It was also proved, that the engine could not be removed without tearing up the soil, and destroying the brick work. Lord Hardwicke, after noticing the old rule of law, said, the strict construction of law had been since relaxed, for the benefit of the public, to encourage tenants for life to do what is advantageous to the estate during their term. It had been said, the engine must be deemed part of the estate, because the estate cannot subsist without the engine. Collieries might formerly have been enjoyed before the invention of engines, and therefore this was only a question of convenience (I). It was true, the old rules of law had been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainderman. But even in these cases, the consideration of public conveniency was admissible for determining the question. One reason that weighed with him was, its being a mixed case between enjoying the profits of the land, and carrying on a species of trade. It made no difference whether a shed over such an engine be made of brick or wood, for it was only intended to be covered from the weather and other inconveniences. This was not the case between an ancestor and an heir, but an intermediate case, as Lord Hobart called it, between a tenant for life and remainderman. After comparing the case to that of emblements, which go to the executor, the Chancellor observed, that little profit could be made of coal mines without this engine, and

(I) Since the time of Lord Hardwicke, it has been abundantly proved that the erection of engines is not always a question of convenience. Many collieries could not have been worked at all, if mining machinery had not been considerably improved. But this fact will make no difference in the decision of these questions.

tenants for lives would be discouraged in erecting them, if they must go from these representatives to a remote remainderman, when the tenant for life might possibly die the next day after the engine was set up. These reasons of public benefit weighed greatly with him, and were a principal ingredient in his opinion. He thought the engine must be considered as part of the personal estate of the late tenant for life (*s*).

A similar decision was pronounced by the same Judge in another case which occurred soon afterwards. Several fire engines had been erected for working a colliery by a tenant for life, and one engine by a person who was either tenant for life or in tail, but it did not appear which estate he had enjoyed. After noticing the case just cited with respect to a tenant for life, the Chancellor said, a tenant in tail had but a particular estate, though somewhat higher than a tenant for life. In the reason of the thing there was no material difference; the determinations had been from consideration of the benefit of trade (*t*) (I).

III. The right of a common tenant to remove articles fixed to the freehold of his landlord is construed with still greater liberality (*u*). It was observed by Lord Hardwicke, in the case of Lawton *v.* Lawton (*x*), with respect to colliery engines, that the case would have been very clear as between landlord and tenant.

It should, however, be remembered that the tenant must exercise his right to remove fixtures during the continu-

(*s*) Lawton *v.* Lawton, 3 Atk. 13.

(*t*) Dudley *v.* Warde, Amb. 113. See Lawton *v.* Salmon, 1 H. Black. 260; Penton *v.* Robart, 2 East, 91; Elwes *v.* Mawe, 3 East, 54.

(*u*) Penton *v.* Robart, Elwes *v.* Mawe, supra; Grymes *v.* Boweren, 6 Bing. 439.

(*x*) Supra.

(I) It appears from the judgment of Lord Hardwicke in the above case, that Lord Talbot had been of opinion that the engines belonged to the inheritance.

ance of the term; if not, it will be considered that he has relinquished his claim (*y*).

But if he has not given up possession of the land, he will not be deemed to have relinquished his claim to the goods, even though that possession be wrongful (*z*). If the lessor makes an actual entry, the goods must be removed within a reasonable time; if not, they will become his property, and he may recover them if they are afterwards removed (*a*).

In mining leases, time is usually given for this purpose beyond the term. Other stipulations are also often made with respect to materials and fixtures.

In a case, where the lessor demised land and salt mines, with power to make warehouses and quays, salt pits, and other works, and a certain rent was reserved for every salt pan then or to be erected, and made use of by the lessee, and the lessee covenanted to leave all such buildings, quays, and works in good repair, it was held, that the lessee could not remove salt pans erected by him during the term (*b*).

In a lease of salt works, the lessees covenanted to leave, at the disposal of the lessors, all the "fixed materials," except the salt pans and other moveable articles used at the works, which were to be taken away by the lessees. Afterwards, the lease was assigned, and the assignees in a new lease covenanted to give up possession of the premises, with all erections, improvements, cisterns, doors, and all other fixtures and appurtenances, but they should be at liberty to take away the salt pans and other articles used, subject to an option to the lessors to purchase them. On the termination of the tenancy, it was held, that the tenants

(*y*) Lyde *v.* Russell, 1 Barn. & Ad. 394; Minshull *v.* Lloyd, 2 M. & W. 459; Leader *v.* Homewood, 5 Com. B., N. S. 546; 27 L. J., C. P. 316.

(*z*) Penton *v.* Robart, supra; Davis *v.* Jones, 2 B. & A. 166.

(*a*) Weeton *v.* Woodcock, 7 M. & W. 14.

(*b*) Earl of Mansfield *v.* Blackburne, 3 Scott, N. S. 820; 6 Bing. N. C. 426.

had a right to take away such fixtures as could properly be called tenants' fixtures (*c*).

A lessee of coal mines and ironworks covenanted to yield up, at the end of the term, all "ways and roads" in good repair, and fit for immediate future use. The tram-plates and wooden sleepers of the railroads laid down by the lessees were seized under an execution against them. Evidence was given of a custom of the country, that the words "ways and roads," did not include those articles. The plates were fastened to the sleepers, which rested on the ground, and were not let into it. It was held, that they were neither fixed to the freehold, nor protected by the covenant—that there was a distinction between the rails and sleepers existing at the date of the lease, and which might be supposed to pass by the lease, and those procured by the lessees—that it could not be the intention of the lease to bind the lessees to continue for a long term of years the repair of railroads which might become utterly useless—and that the covenant was satisfied by the roads being left in a proper state for the relaying of rails by the lessor. There was another covenant for the repair of "furnaces and other works," which was held not to apply to that case. Certain stone sleepers and the trams resting on them were disclaimed by the execution creditor (*d*).

In a case, where a colliery was alleged to be carried on by a married woman, assisted by her husband, but for her own benefit, and some of the chattels were seized by a creditor of the husband, it was left to the jury, whether the colliery was so carried on—and, on their finding for the wife, the court refused to disturb the verdict (*e*).

(*c*) Sumner *v.* Bromilow, 34 L. J., Q. B. 130.

(*d*) Beaufort (Duke) *v.* Bates, 3 De G., F. & G. 381; 31 L. J., Ch. 481.

(*e*) Bird *v.* Crabb, 30 L. J., Ex. 318.

Frequent disputes occur with respect to mining machinery and stock, in connection with the claims of assignees in bankruptcy, and judgment and other creditors.

As a general rule, all the moveable materials will, in cases of bankruptcy, belong to the assignees. But there are exceptions to this rule.

It often happens, in mining cases, particularly in the coal trade, that the machinery and plant are demised along with the mine, on specified terms of maintenance and restoration. Such a practice may be called a usage of trade, and may not afford to creditors a fair presumption of ownership. In such cases, therefore, the fixtures and moveable articles will not be within the order and disposition of a trader who is subject to the bankrupt laws (*f*).

A mortgagee of a manufactory, with the engines and other fixtures, is entitled, as against assignees in bankruptcy, to all the machinery fixed to the freehold (*g*).

The moveable machinery comprised in a mortgage remains in the order and disposition of a bankrupt, and passes to his assignees (*h*).

A mortgage of trade fixtures, with the freehold, does not require registry as a bill of sale under 17 & 18 Vict. c. 36 (*i*).

A judgment creditor has not the same strong rights to moveable articles as assignees in bankruptcy. His claim is liable to be contested by mortgagees and other assignees. For he has no right to seize the property of another —and it may be shown that the possession of the apparent owner was consistent with the right of property being vested in another owner.

Disputes have often arisen in respect of the future stock which has been acquired after the date of a security, either

(*f*) Storer *v.* Hunter, 3 B. & C. 368.

(*g*) Mather *v.* Fraser, 2 Kay & J. 536; 25 L. J., Ch. 361; Whitmore *v.* Empson, 23 Beav. 313; 26 L. J., Ch. 364.

(*h*) Whitmore *v.* Empson, supra.

(*i*) Mather *v.* Fraser, supra.

as substituted, or altogether new stock. Recent decisions have established, that, if a security contains apt words of transfer relating to future stock, it is not necessary for a mortgagee, as against a judgment creditor, or a subsequent incumbrancer, to resort, from time to time, to any additional means of confirming his security. For an agreement to assign future chattels amounts, in equity, to an actual assignment.

A mortgagor assigned, by deed, the machinery of his mill, with a proviso, that all the machinery, implements, and things which, during the continuance of the security, should be fixed or placed in or about the mill, in addition or in substitution, should be subject to the security, and with a covenant on the part of the mortgagor for further assurance of the new stock. No further transfer of that stock had been made to the mortgagee, nor any possession given to him. It was decided by Stuart, V. C., that the substituted machinery, as against a judgment creditor who had seized, remained in possession of the mortgagor, as the agent of the mortgagee (*k*). This decree was reversed by Campbell, L. C., on the ground that a new act of ownership was necessary in equity, as well as at law, and that no such agency existed (*l*). But the decree was restored in the House of Lords, on the ground, that the equitable title was complete, and did not depend on possession, and that on the acquisition of the new machinery the mortgagor held it as trustee for the mortgagee (*m*).

But a mere licence to seize will not have that effect.

The lessee of a brickfield assigned to a mortgagee the stock of bricks then being, *or at any time thereafter to be*, thereon, with the plant and machinery. Another bill of sale was afterwards given to another mortgagee, with the concurrence of the first mortgagee, who postponed his

(*k*) Holroyd *v.* Marshall, 2 Giff. 382; 2 De G., F. & J. 596; 29 L. J., Ch. 655.

(*l*) Ibid. 2 De G., F. & J. 596; 30 L. J., Ch. 385.

(*m*) Ibid. 33 L. J., Ch. 193.

security. This bill of sale assigned all the clay and bricks, *which were then in and upon the brickfield*, with full licence, power and authority for the mortgagee to appoint a manager, and also to enter, and to seize and hold possession of all the clay, bricks, plant, and stock which might then be there, in like manner as if the same formed part of the chattels and effects thereby assigned. None of these powers were exercised. Other bills of sale were given to a third mortgagee in a similar form, under which he entered and claimed the new stock in preference to those claiming under the second mortgagee. It was held, that the future stock did not pass by the assignment. It was observed by Westbury, L. C., that if there had been on the face of the deed either expressly, or by implication, an agreement that the future chattels should be comprised in the security, a present interest would have been acquired in them—but that the language of the instrument was confined to the effects on the field at the time—that this was shown by the contrast between the first two securities—that the power to appoint a manager, and the power to enter and dispose of the bricks and other articles, also excluded the notion of any present interest in the property afterwards acquired—and that a power was different from an interest, which attached instantly on the new property without the act of seizure (*n*).

(*n*) Reeve *v.* Whitmore, Martin *v.* Whitmore, 33 L. J., Ch. 63.

CHAPTER VII.

THE SALE OF MINES AND SHARES — SPECIFIC PERFORMANCE.

A PURCHASER of an estate is not bound to acquaint a vendor with any latent advantage in the estate; for a concealment of this kind may amount to moral culpability without becoming a fraud which can be brought within legal cognizance. For a court of law or equity cannot undertake the performance of duties which may imperfectly bind the conscience (I).

If there be no positive obligation to disclosure, arising from the impossibility of otherwise procuring the knowledge of facts, or from some equally stringent cause, a vendor cannot complain, if his own sense and opportunity have failed to perceive advantages which a purchaser has apprehended. Thus, it was held by Lord Thurlow, that if A., knowing there is a mine in the land of B., of which he knows B. to be ignorant, should, concealing the fact, enter into a contract to purchase the land for a price, which the estate would be worth without considering the mine, the contract would be good, because A., as the buyer, is not obliged, from the nature of the contract, to make the discovery. In such cases, the question is not, whether an advantage has been taken, which in point of morals is wrong, or which a man of delicacy would not have entered into. It is essentially necessary, in order to set aside the

(I) A casuist might rely on this scriptural text:—"The kingdom of heaven is like unto treasure hid in a field; the which, when a man hath found, he hideth, and for joy thereof goeth and selleth all that he hath, and buyeth that field." St. Matt. xiii. 44.

transaction, not only that a great advantage should be taken, but it must arise from some obligation to make the discovery. The Court would not correct a contract, merely because a man of nice honour would not have entered into it; it must fall within some definition of fraud; the rule must be drawn so as not to affect the general transactionsof mankind (*a*).

In such cases, therefore, a purchaser may preserve silence, and content himself with simply expressing the truth. *Aliud est celare, aliud tacere* (*b*). But it was remarked by Lord Eldon, that very little is sufficient to affect the application of the principle; if a single word is dropped which tends to mislead the vendor, the rule will not be allowed to operate (*c*).

On the other hand, if a vendor make false representations to a purchaser with respect to the advantages of an investment, it will amount to fraud, and the purchaser may be relieved in equity by a decree for setting aside the contract, or even the conveyance (*d*).

In the great case of Small *v.* Attwood (*e*), the vendor was charged with making or authorizing false statements, upon a treaty for the purchase of extensive iron mines and iron works, with respect to the cost of manufactured pig iron. The contract was silent upon the subject. A difference of 16*s.* per ton was stated to exist between the explanations of the defendant and the actual cost. This would have produced a difference of 14,000*l.* a year in the accounts of the concern. Similar misstatements were charged with respect to the conversion of the metal into refined iron, blooms, and rods. Lord Lyndhurst, C. B., decided, that a case of misstatement with the knowledge of the party, in other words, that a case of fraud had

(*a*) Fox *v.* Mackreth, 2 Bro. C. C. 420.

(*b*) Cicero, De Off., lib. 3, c. 12.

(*c*) Turner *v.* Harvey, Jac. 178. See also Deane *v.* Rastron, 1 Anst. 64; Brealey *v.* Collins, You. 317.

(*d*) Edwards *v.* M'Leay, Coop. 308; Lowndes *v.* Lane, 2 Cox, 363.

(*e*) 1 You. 407; 6 Cl. & Fin. 232.

been proved against the defendant, and that the contract should be rescinded. But it was ultimately decided in the House of Lords, that such a case was not sufficiently proved.

In the above case, there was a disturbance of the stratification in an important part of the coal mines, amounting either to an actual fault, or producing similar consequences. The defect was discovered some months previous to the conclusion of the negotiation. The defendant did not sanction this concealment, but he was aware of the defect, and evaded the questions put with respect to the mine being a perfect mine. But the learned judge held, that the purchasers, in taking possession, must have known immediately the circumstances connected with the fault, and that it was too late, after the expiration of six months, to file a bill for setting aside the contract (*f*).

Delay in applying for relief forms a particular objection to suits instituted for setting aside sales or leases of mines (*g*), or for specific performance of contracts relating to them (*h*).

In like manner, a purchaser will not generally be relieved, if his inquiries or his conduct have not been prudent or proper.

A bill was filed, in Ireland, to enforce payment of the residue of the purchase-money for a lease of mines to a company, which had been in possession for three years. A cross bill was filed by the company, praying relief from the purchase, on the ground that the lessor and the lessee (who was in effect the company) had joined in fraudulent misrepresentations. Upon an appeal from the decree made in the original bill, which was affirmed, it was held, in the House of Lords, per Lord Cottenham, C., that the alleged ground of fraud could not sustain the cross bill. He

(*f*) 1 You. 503. See Haywood *v.* Cope, 25 Beav. 140; 27 L. J., Ch. 468.

(*g*) Ernest *v.* Vivian, 33 L. J., Ch. 513.

(*h*) Pollard *v.* Clayton, 1 Kay & J. 462.

referred to the distinction between what was necessary to resist a suit for specific performance of a contract, and a suit to set aside a deed executed and an arrangement completed. It was urged that the lease was not binding on the company, because the terms were not according to the previous written contract. The facts failed, but he would have had to show that the company were not competent to vary the terms, and that the acceptance of the deed, as it stood, and the acting under it in the enjoyment and actual consumption of the property from that time, ought to have no effect in precluding them from their raising such a case for relief. In a case depending on alleged misrepresentations as to the nature and value of the thing purchased, the defendant could not adduce more conclusive evidence, than by showing that the plaintiff was from the beginning cognizant of all the matters complained of, or, after full information, continued to deal with the property, and even to exhaust it in the enjoyment, as by working mines (*i*).

In an action of assumpsit for purchase-money, which had been paid, it appeared the plaintiff had purchased many shares in a supposed joint-stock mining company, in consequence of newspaper advertisements, and of representations made to him by the agents of the defendants. After the purchase was completed, he discovered these statements and representations to be fraudulent, and the whole scheme a deception. It appeared, however, on the trial, that after these transactions the plaintiff had formed a new company, by consolidating the shares with other property, and that he had sold shares in this new company, and realized a large sum of money. Further evidence of fraud was proved by the plaintiff at the time of the original purchase with respect to the actual amount of outlay incurred, which he had not discovered till after he had disposed of the shares in the new company. It was

(*i*) Vigers *v.* Pike, 8 Cl. & Fin. 562; 2 Dru. & W. 1.

held, that the plaintiff, knowing of the fraud, had elected to take the contract, and had lost his right of rescinding it, and that the discovery of the new fraud did not revive the right of repudiation (*j*).

In another case, it was alleged that several specified untrue representations had been made to the purchaser with respect to the number of working levels, the yield of ore, and the actual state of the mines. The mine was proposed to be worked in shares on the cost-book plan. It was proved that the plaintiff took an active part in settling the minutes of a meeting and the rules of the company, but that he declined to sign them with the defendants, who were managers, and who had signed. But he took shares, and soon afterwards made a second visit to the mine with other shareholders, when he examined the working and the ore. The mine was then considered very promising, and he took several more shares. A few months afterwards he became doubtful of success, and employed an engineer to inspect the mine, and made a report which complained of the inaccuracy of a previous report made for the company before any distribution of shares. This opinion was contested, but the mine was very unprofitable. The plaintiff filed a bill to set aside the contract. But it was held by Romilly, M. R., on the evidence, that the state of the mine was not shown to have been misrepresented at the time, although subsequent workings had disproved its promise; and that, as to other allegations, the plaintiff having had the same sources of information as the defendants, and having equally availed himself of those means, had only been deceived by himself by false and exaggerated inferences; and there was no evidence of fraud on the part of the defendants, who might have had equally exaggerated ideas, and who were also interested in the prosperity of the mine, and had retained their shares, when these were being sold at a large premium. The bill was

(*j*) Campbell *v.* Fleming, 1 Ad. & E. 40.

dismissed with costs, and, on appeal, the decree was affirmed, without prejudice to the plaintiff bringing an action, if he should be so advised (*k*).

Trustees are not only incapable, while acting in the trusts, to become purchasers of trust property, even by auction, but they cannot be concerned in any bargain with a future purchaser, however well the property may have been sold. Thus, in an important case, a purchase, by auction, by one not connected with the property, of iron works sold, under an order of Chancery, at a large price, and after a severe contest, was set aside by Lord Eldon, after payment into court of all the purchase-money, both for the estate and the stock, which was valued, and after the acceptance of the title, and the delivery of the possession, and the carrying on of the works by the purchaser. In this case, one of the three trustees for sale under Lord Bute's will, who had been and was continued as resident manager of the works, and was consulted as to the sale, and the reserved price, and who directed the valuation of the stock, had previously to the sale accepted an agreement from the intended purchaser that, in the event of the latter being the purchaser at a price not exceeding 63,000*l.*, he was to charge five per cent. interest by way of rent to himself, and to be a partner for one half share in carrying on the works, and the manager and a brother of the intended purchaser were to be partners, each for one quarter share, and to find their proportion of the capital. The price had exceeded 63,000*l.* by 9,000*l.*, yet the agreement was not deemed binding, and, at last, the purchaser paid to the manager 1,500*l.* as a compensation for his loss of a share in the partnership. The decree was affirmed in the House of Lords (*l*).

(*k*) Jennings *v.* Broughton, 22 L. J., C. C. 585; 23 L. J., C. C. 999; 5 De G., M. & G. 126; 17 Beav. 234.

(*l*) Bailey *v.* Watkins, Lord St. Leonards, Law of Prop., H. of Lords, 726. See 6 Bligh, N. S. 275 n.

The same rule applies to agents (*m*) and solicitors. But, under particular circumstances, a sale to an agent was confirmed.

In the case of Wren *v.* Kirton (*n*), a colliery had been put up to sale under a decree, and 23,000*l.* was offered by a *bonâ fide* bidder. The sale was defeated by setting up a fictitious bidder. The property was again put up three times. On the two first occasions 12,000*l.* and 6,000*l.* only were offered. On the last occasion it was sold to a trustee for the agent and manager of the colliery for 15,000*l.* The motion to confirm this sale was opposed.—Lord Eldon observed, it was a very difficult and important case. If it had been an original sale, and the agent had purchased in the name of another person, very slight circumstances would have induced him, even at some risk, to have set that aside—as it was the duty of the agent, if he meant to bid, to furnish all the knowledge he had to those who were to sell. A regular proceeding in the Master's office, which produced a bidding of 23,000*l.* by a responsible person, was met by a very improper transaction in setting up a man of straw to defeat the sale, which had occasioned the loss. In general, the Court will at some risk put the property up again, if the sale has not been properly conducted (*o*). The difficulty was the danger of further loss by the re-sale. He added, he would not hesitate to open the sale, if the least advance upon 15,000*l.* was offered; but without such an offer there was nothing leading him to suppose it would ever again reach the sum originally bid. An order was accordingly made but with considerable reluctance, to confirm the report, unless before the first seal an application should be made to open the biddings, with security to answer the differ-

(*m*) York Buildings Company *v.* Mackenzie, 8 Bro. P. C. 42; Lowther *v.* Lowther, 13 Ves. 95; Woodhouse *v.* Meredith, 1 Jac. & W. 204.

(*n*) 8 Ves. 502.

(*o*) See Watson *v.* Birch, 2 Ves. jun. 53.

ence between the produce of the re-sale, and the sum of 15,000*l.* (*p*).

In a suit for setting aside the purchase of manors, lands, and mines, by a solicitor from his client in 1837, it was shown, that the solicitor had treated with other solicitors who were employed by the vendor for that purpose, but that he had been the confidential adviser of the vendor, and, on his death, of his trustees, till 1853, when the solicitor himself died. He had been informed, before the sale, that the property was worth 100*l.* an acre, and the price given was 13*l.* But there was no evidence as to any communication of that alleged value. It was proved, that a very small portion of the minerals had been disposed of by the purchaser at a sum greatly exceeding the whole amount of the original purchase-money. It was alleged, on the contrary, that the value of the coal had much increased, not only from improved methods of working, but in consequence of the opening of a new railway. The transaction was set aside, on re-payment of the purchase-money, with interest (*q*).

When a sale of mines, which might have been successfully repudiated by the heir in tail of a deceased vendor, has been confirmed by the heir, he cannot claim interest in the purchase sum, on the ground that the mines had been wrongfully worked (*r*).

Honesty and good faith are required from co-purchasers, as well as from co-partners. One of five purchasers of a mine had secretly received a large bonus or bribe in the negotiation for its sale. The mine was afterwards sold to a company at a price far beyond what it might have been got, except for the fraud, but which proved to be really cheap to the company. It was held, that the transaction

(*p*) 8 Ves. 502.

(*q*) Gresley *v.* Mousley, 2 De G. & J. 78; 1 Giff. 450; 27 L. J., Ch. 779; 28 Ibid., Ch. 620.

(*r*) Ibid., 8 Jur., N. S. 320.

relating to the bribe was void, both as against the four co-purchasers and the company (*s*).

It has been expressly held, that, in the absence of express stipulation to the contrary, there is, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as that of the vendor to the lease itself, and that this undertaking is available at law as well as in equity (*t*).

But it has also been held, that a vendor of shares of mines, managed on the cost-book principle, is not bound to show the title to the mine itself, but only to disclose a title to the share itself. The vendor insisted that by the custom of transfer in these cases he was only obliged to show, as evidence of his title, the certificate of an entry in his name in the cost-book as the owner—that the shares gave only a right to profits and not to the land itself, and that the custom, which was recognized by statute (*u*), coupled with the particulars of sale, showed this to be the contract. Wigram, V. C., held, that, as between the adventurers, the entries were *primâ facie* evidence of title, but as between them and strangers, who might possibly claim adversely, the cost-book was no evidence for any purpose whatever. If the terms of the agreement imported that the vendor was merely to retire and give the purchaser his place, such as it was, the vendor might have specific performance. But if the contract was not so limited, he was bound to tell the purchaser what his interest was in the mine. Had the purchaser no right to inquire whether the interest in the joint adventure was leasehold or freehold, or was by licence or trespass? Without deciding the extent to which a purchaser could require evidence, it might be said a vendor could not

(*s*) Beck *v.* Kantorowiez, 3 Kay & J. 230.

(*t*) White *v.* Foljambe, 11 Ves. 337; Souter *v.* Drake, 5 B. & Ad. 1002; Hall *v.* Betty, 4 M. & G. 410; 11 L. J., N. S., C. P. 256.

(*u*) 7 & 8 Vict. c. 110, s. 63.

simply refuse to give any account of the title to the mine the shares of which he had contracted to sell.

But this decision was reversed on appeal, where it was held, that the vendor was not bound to show a title to the mine itself, but that the production of an entry in the cost-book was not sufficient evidence of ownership of the shares. Lord Cottenham, L. C., said, it had been decided over and over again that an interest in mines was not of the same character as land, for the purpose of title. The question was, whether the plaintiff had done all that he ought to have done, considering the nature of the property sold. He had contracted to sell shares in mines, but in none of the cases had he shown what the nature of the mining company was, nor whether he could or could not show any deed. The purchaser had a right to know all the vendor could tell him, and to know what it was he had bought. The plaintiff had shown nothing, but that there were mines in progress—and, as to the mode of transferring the shares, in one set of cases he had shown there were regular, or at least distinct, deeds or papers signed by the parties, purporting to be transfers of shares, which existed in a separate form, and on the authority of the papers so signed by the vendor the transfer of the shares, in point of fact, took place. Those were unquestionably the papers, the title deeds, under which the vendor derived his title, but those were not produced. Again, in others, there was a sort of entry, purporting to be signed, appearing in the books; and, with regard to the third, there was no other evidence of title but that. It was true, an officer of the company had the power, by an entry of transfer, to create an interest, but there was no evidence whatever as to the authority under which the officer acted. There must surely, at least, be some memorandum in writing, authorizing him to make an entry of transfer. A party's interest could hardly be disposed of by the mere entry of a third person—and there were no means of showing that he, by that entry, was authorized to transfer

any interest, if the nature of the interest was capable of being transferred. All that was not shown, and the nature of the interest did not appear. For the present purpose it was sufficient to say, without expressing any opinion as to the nature of the interest or the details of the particular objections, that the vendor was bound to give more information. The case was sent back to the Master to review his report (*x*).

A shareholder in a mining company under the cost-book principle, which was afterwards converted into a limited company, and wound up, brought an action at law against three of the directors for recovering the money paid by him on account of his shares, on the ground of fraudulent misrepresentation. He had offered to return the shares. It was held, that the action was not maintainable, as he could not return the shares in the same state as at the time of the contract. He had for three years taken his chance of profits, and had received dividends,—the shares were no longer held in a voluntary partnership, but in a *quasi* corporation,—the offer to return the shares had not been made till after the affair was totally ruined,—and many liabilities might have been contracted. It was observed by Campbell, C. J., that the plaintiff ought to have brought a special action on the case for the fraud practised on him, in which he might have recovered for the injury he had sustained (*y*).

A shareholder had agreed in writing to sell a share in a mine at a certain sum, and the purchaser agreed to buy at that price. It was also agreed by them, in the same instrument, to form a company, and, as soon as the company was registered, the purchaser was to pay the whole of the purchase sum. In an action for non-payment, it was held, that it was a good answer to the declaration which averred general performance of conditions prece-

(*x*) Curling *v.* Flight, 5 Hare, 242; 17 L. J., N. S., C. C. 79, 359.

(*y*) Clarke *v.* Dickson, E. B. & E. 148; 27 L. J., Q. B. 223.

dent, that the plaintiff was not ready and willing to convey his share (*z*).

When an estate is in settlement, with the usual powers of sale and exchange, it has been held, that the trustees cannot sell the minerals apart from the lands. The same rule was applied to mines as to timber, and for the same reason, that the power must be exercised, so as not to give the tenant for life more out of the property than he would have, if the power were not exercised. A tenant for life might not only work the mines under the settled lands, but also those under the lands to be purchased with the monies arising from the sale of the surface of the settled lands, and he would thus get the *corpus* of both estates (*a*).

Under a recent statute for facilitating leases and sales of settled estates, the Court of Chancery may now authorize the sale of such estates, and may direct the exception of any "earth, coal, stone or mineral," and the reservation of any rights or privileges, and may require the purchaser to enter into any covenants, or submit to any restrictions which it may deem advisable (*b*).

In one case of sale of mines under that act, the contract was ordered to be carried into effect by a grant of the minerals, with a provision limiting the time, within which the coal was to be worked out, to ten years (*c*).

If a purchaser take possession of mines, and manage the property under a contract, stipulating that a good title should be made by a specified future day, and it ap-

(*z*) Marsden *v.* Moore, 4 Hurl. & N. 500; 28 L. J., Exch. 288.

(*a*) Buckley *v.* Howell, 29 Beav. 546; 30 L. J., Ch. 524.

(*b*) 19 & 20 Vict. c. 120, ss. 11, 13.

(*c*) Re Mallin's Settled Estates, 3 Giff. 126; 30 L. J., Ch., 929.

pear to be the intention of the parties that the purchaser should immediately take possession, there will be no waiver of objections on the part of the purchaser (*d*). The same rule applies to lessees (*e*).

When specific performance is refused to be decreed to a vendor for want of a good title, and the purchaser is charged with gross mismanagement, the Court will not, upon a record so framed, and under a prayer for general relief, direct accounts or inquiries as to the defendant's possession or management, with a view to ascertain whether any compensation should be made by him to the plaintiff. Upon appeal from the Vice-Chancellor, who dismissed the bill with costs, it was observed by Lord Lyndhurst, that it was true the bill contained charges of mismanagement of the property by the purchaser; but these charges were introduced, not with a view to demand compensation for any loss alleged to have been sustained, but in order to establish the fact of acceptance of the title by the defendant, and of waiver of all objections to it, and to make out the plaintiff's right to specific performance. Under such circumstances, it would be unjust to allow the plaintiff to abandon the case made by his bill, and to come at the hearing for a new remedy, upon a record framed with an aspect altogether different.

The appeal was then dismissed, but without prejudice to any suit which the plaintiff might think fit to institute, for the purpose of recovering compensation (*f*).

In the above case there was only the purchase of shares, although the purchaser was in the possession of the whole mine. It was observed by the Court, there were other persons interested in the property when the alleged mismanagement took place. Under a decree between the vendor and purchaser of shares only, all the liabilities

(*d*) Stevens *v.* Guppy, 3 Russ. 171.

(*e*) Haywood *v.* Cope, 25 Beav. 140; 27 L. J., Ch. 468.

(*f*) Stevens *v.* Guppy, 3 Russ. 184.

which might be involved in giving the vendor the compensation he asked could not be arranged (*g*).

In a contract to purchase all the coal under an estate the purchase-money was to be paid by instalments. A bill for specific performance was filed by the vendor, and a motion was made on his part to order the purchaser to pay into Court the amount of the first instalment which was then due. No conveyance had been made, but the contract was admitted, and the title was not disputed. The Court made the order for payment of the money in a month, as the defendant was in possession and working the mines (*h*).

In another case, the lessees of a coal mine had purchased the reversion, and the vendors had filed a bill for specific performance. They applied for the payment of the purchase-money into Court. The motion was refused on the ground, that the purchasers were not in possession under the contract, but under the lease. But, as they had paid no rent, and the property was wearing out, they were ordered to pay the arrears of rent into Court (*i*).

If property become much depreciated in value during a dispute in which a purchaser is free from blame, and a decree of specific performance would be no compensation to him, he will be entitled to the option either of recovering the property improperly withheld, or the value of it at the time of its being withheld (*k*).

In an action at law, the plaintiff had granted by deed to the defendant and another all the coals in certain lands in equal shares, in consideration of 40*l.* for every acre of the coal which *should be found*, and until the price should be fully paid, the purchasers covenanted to pay 40*l.* a year, whether the whole of an acre of the coal should in every such year be gotten or not. The plaintiff had averred

(*g*) Jefferys *v.* Smith, 3 Russ. 158.

(*h*) Buck *v.* Lodge, 18 Ves. 450. See Cutler *v.* Simons, 2 Mer. 103.

(*i*) Robertshaw *v.* Bray, 35 L. J., Ch. 844.

(*k*) Brown *v.* Thorpe, 11 L. J., N. S., C. C. 73.

only the existence of coal there. It was held, that the finding of the coals was a condition precedent to the obligation to pay; that the plaintiff should have averred in his declaration that coal had been found there, and that the averment that coal was there was consistent with its never having been found (*l*).

In another case, the plaintiff agreed to sell to the defendant the coal under twelve acres of land, at the rate of 350*l*. per surface acre, to be paid by yearly instalments of 350*l*., till the whole should be worked out; and it was also agreed, that if more than one acre was got in any one year, a further proportionate sum should be paid for the excess. The defendant accepted the title, and worked the mines. But the plaintiff insisted on the insertion of a covenant in the conveyance, empowering him and his agents to enter the mines, and measure the quantity of coal worked in each year. It was contended for the defendant, that such a covenant was usual in leases where royalties were reserved, but not in sales. Wigram, V. C., said, the general rule was, that where a person contracts with another in respect to property, there was an implied contract for such covenants as should give security for the due performance of the contract. If the property was leased at royalty rent, custom would give the right to inspect. There was no evidence as to absolute sales; but such a covenant was necessary, when the price was not paid down. The vendor had only an interest in the quantity of coal raised, and his right of entry, therefore, must be limited to the necessary protection of his interest. Specific performance was decreed, with a clause enabling an inspection and measurement, at all reasonable times, for the sole purpose of ascertaining the coal worked in each year, till the whole was got, or all the price was paid (*m*).

(*l*) Jowett *v.* Spencer, 1 Exch. 647; 15 L. J., N. S., Exch. 347.

(*m*) Blakesly *v.* Wieldon, 1 Hare, 176; 11 L. J., N. S., C. C. 166.

In a suit for specific performance by lessees, the lessor had entered into the usual covenant for peaceable enjoyment. The property consisted of furnaces, in repairing which the lessees had expended money. The mines belonged to other owners, who had worked them. The lessees alleged, that they had no knowledge of the ownership of the mines at the time of their agreement for a lease, and that their works had been much injured by subsidence. They prayed, that the agreement might be specifically performed under the direction of the Court, and that, if for want of title or otherwise, specific performance could not be made, the agreement should be cancelled, without prejudice to any action at law on the part of the lessees. It was held, that they were entitled to specific performance, and that the lessor should enter into an absolute covenant for quiet enjoyment during the term. Both parties were left to remedies at law, with respect to any question of injury actually sustained by the lessees (*n*).

Specific performance of a contract for the sale of lands in which there is a reservation of mines will be decreed, if there be a great improbability of the purchaser being disturbed.

In a case of this kind it was objected, that there was a reservation, in a former grant from the crown, of tin, lead and all royal mines. It was reported by the master, that there was a probability of the existence of such mines, and that the vendor could not make a good title. But it was held, at the hearing, by Lord Hardwicke, that the objection could not be sustained. It was the business of the Court, he observed, to carry such agreements into execution, and it must govern itself by a moral certainty; for it was impossible, in the nature of things, that there should be a mathematical certainty of a good title. There was no pretence that there had been any search for royal mines for one hundred and eleven years, and, upon examination,

(*n*) Onions *v.* Cohen, 2 Hem. & M. 354; 34 L. J., Ch. 338.

the probability was great that there were no such mines. After denying the power of the crown, where there is only a bare reservation without a right of entry, to work for mines (*o*), he said, it would be of mischievous consequence to allow such an objection to a title, especially as all grants from the crown have, for the most part, such a general reservation; but the fact in the present case was, that there had never been an exertion of this right in a single instance since the grant, and in all probability there never would (*p*).

In like manner, specific performance of a contract for the sale of mines will be decreed, if there is no probability of the purchaser being disturbed by actions of trespass in the course of his operations. A purchaser, on one occasion, of some valuable mines, refused to perform his contract, because the mines were situate under a common, and consequently he might be subject to actions for sinking shafts to work the mines. But Lord Eldon, having shown the improbability of any obstruction from the commoners, said, that in case such an action were brought, he should think a farthing damages quite enough, and decreed a specific performance (*q*).

It has been observed, that this case must have turned upon the improbability of the purchaser being disturbed, and that otherwise it has gone to the utmost verge of the law; for although only trifling damages could be recovered, yet that would be no ground for a nonsuit, and the estate might, therefore, subject the purchaser to litigation, whenever malice or caprice might induce any of the commoners to commence actions against him (*r*).

If, however, there be a distinct reservation of the mines, it was held by Sir William Grant, that the purchaser would be entitled to compensation, even if the reservation is of an old date, and the right under it has never been asserted

(*o*) See Chap. III.

(*p*) Lyddal *v.* Weston, 2 Atk. 19.

(*q*) Anon., Chan. 7th Sept. 1803, cited in Sugden's Vend. and Purch. vol. 2, p. 184.

(*r*) Ibid.

by any actual attempts to work the mines. In the case alluded to, the reservation was contained in a deed dated in 1704, and comprised all the springs, veins and mines of salt in certain parts of the property, with full liberty, *without paying anything*, to sink pits, and do all things necessary for carrying the minerals away. This reservation was objected to by a purchaser, as a ground for compensation, and the Master of the Rolls decreed him compensation. After noticing the fact of the ownership of the mines of salt, and that no inference of release or abandonment could be drawn from their non-user, Sir William Grant observed, that the case of Lyddal *v.* Weston (*s*), instead of being an authority for the defendant, appeared to afford an argument by implication against him. The grounds of that judgment were that, upon examination, the probability was great that there were no mines; and that the crown having merely reserved the mines without a right of entry, could not grant a licence to enter and work them. That position was liable to considerable doubt (*t*); but Lord Hardwicke thought it necessary to assume it, before he could determine against the validity of the purchaser's objection. In the present case, it was not alleged, that there was no probability of mines upon the estate; it was rather admitted that there were, and there was a reservation of a right of entry, upon the want of which Lord Hardwicke had laid stress. The defendant, he added, chose to consider this, not as an objection to the title, but as a ground for compensation, and he was entitled to it (*u*).

It may evidently be gathered from the judgment of Sir William Grant, in the above case, that if the purchaser had altogether resisted the performance of his contract, he would have been allowed to do so. It has been clearly shown that, in general, a right of entry is, in the absence

(*s*) Supra.

(*t*) See Chap. III.

(*u*) Seaman *v.* Vaudrey, 16 Ves. 390.

of stipulation to the contrary, incident to the right to mines (*x*). The doctrine adopted by Lord Hardwicke upon this subject, and which was repudiated by Sir Wm. Grant, with respect to royal mines only, cannot be supported with respect to any mines. One of the main reasons for his decision, therefore, in Lyddal *v.* Weston, is defective, and that decision must rest upon the evidence of the improbability of there being mines to create any disturbance to the purchaser. Such an improbability, however, should not rest upon slender and inadequate evidence. If there is a legal reservation of mines, and mines are supposed, or even suspected to exist, it would be hard to force a title upon a purchaser, which might expose him to the complete waste of his estate. There was, in the case of Seaman *v.* Vaudrey, a stipulation in the deed of reservation, that the right to work the mines was exercisable without incurring any liability for damages. No compensation, short of the amount of purchase-money, might satisfy such a case as this. In such instances, extraordinary caution is required, and still stronger evidence of the non-existence of mines should be adduced, in order to compel the performance of a contract. Where there is no probability of there being any mines, the purchaser is subject to the caprice or ignorance of individuals, who, in spite of appearances or the dictates of experience, may choose to embark upon a reckless adventure in search of minerals, which are not there to be found. The fact of improbability, therefore, should be based upon such competent and substantial evidence as may justify the Court in exposing a purchaser to such a risk.

The vendor of an estate containing coal mines had granted the right to work coals, subject to a proviso, that, when the workings had finally ceased, the pits should be filled up, and the land restored to a state of cultivation. In 1843, the coal ceased to be worked, the pits were

(*x*) See Chap. V.

filled up, and the land was restored. The estate was then sold under a decree of Court. A claim was made by an assignee of the mines to re-open them—and the purchaser claimed compensation. It was held, in 1858, that the agreement and the evidence sanctioned the claim, and that the abandonment had only been temporary. Compensation was given, and the amount was directed to be determined by an expert appointed by the Court (*y*).

It is no objection to a bill for setting aside a contract that the purchasers have been in possession, and have made great alterations in the property. It is enough that they act fairly in the management of the property, and take the natural exercise of the rights of supposed owners (*z*).

The purchaser of an estate sold under a decree in Chancery is entitled, as a general rule, to be let into possession from the quarter day preceding his purchase, on paying the purchase-money before the succeeding quarter day (*a*). But this rule has been held to be inapplicable to the case of a colliery, in which the accounts of the concern were settled monthly, and in which there was no such thing as a quarter day; for the profits of such property may produce more in one quarter than in the preceding ten years. A colliery is a trade, and not merely a property in land. The purchaser was, therefore, declared to be entitled to the profits from the commencement of the month in which he purchased, paying his purchase-money in the course of that month (*b*). A person is not considered to be an absolute purchaser until the confirmation of the master's report (*c*).

The practice of opening biddings in sales under decrees in Chancery has often been justly reprobated. On one occasion, Lord Eldon said, during a period of nearly half

(*y*) Ramsden *v.* Hurst, 27 L. J., Ch. 482.

(*z*) Small *v.* Attwood, 1 You. 506.

(*a*) Marfill *v.* Rudge, 2 You. & C. 566.

(*b*) Wren *v.* Kirton, 8 Ves. 502; Williams *v.* Attenborough, Turn. & Russ. 70.

(*c*) Twigg *v.* Fifield, 13 Ves. 517; Garrick *v.* Earl Camden, 2 Cox, 231.

a century which he had passed in the Court, he had heard one and all of its judges lament the introduction of the practice (*d*). It is now, however, firmly established by numerous cases, and almost daily experience.

But the rules with respect to opening biddings do not apply to the sales of mines. In the case of a colliery, an order for opening the biddings was made by the Vice-Chancellor, but it was discharged by Lord Eldon, who observed, that land kept generally the same value; but collieries were liable not only to fluctuations in value, but to destruction; they were like land in a country liable to earthquakes. Again, upon a re-sale of the property the purchaser might be tired of his bargain before he has completed his purchase; and although the Court might compel the final bidder to pay the money, the process was such, that, in a great many cases, it was more for the interests of the vendors to abandon the bargain, than to put in force the process of the Court. Not even a *bonâ fide* bidder can, in any case, be said to have any right to open the biddings. The question was, whether regard being had to the nature of the property, the circumstances of the case, and the general interest of the suitors of the Court, not to the interest of purchasers, so much advantage was held out as to induce the Court to open the biddings (*e*).

In the above case, the purchase could not be confirmed for a considerable time, and it became necessary to take into consideration who should have the intermediate management. It was finally agreed, that the purchaser should work the colliery under the superintendence of the trustees. It was observed by the Court, it would have been folly in the purchaser if he had not insisted on having in some measure the management; for if, between the day of bidding and the confirmation of the purchase, the value of the mine had fallen from accidental causes injurious to the working, from some rival coal mine, or a destructive inun-

(*d*) Turn. & Russ. 75.

(*e*) Williams *v.* Attenborough, Turn. & Russ. 70.

dation, still, if the title had been completed at the time his report was confirmed, he would have been compelled to take the property without entering into the question, whether the management had been advantageous or disadvantageous. It was added that if the management had been advantageous, to discharge a purchaser under such circumstances, upon giving him his costs merely, without making some allowance for the expenses incurred in the management, would be treating him in a way very detrimental to the general interests of all those who have collieries to dispose of, through the intervention of the Court (*f*).

An equitable jurisdiction has been given to county courts in all suits for specific performance, where the purchase sum does not exceed 500*l.* (*g*).

An agreement for the sale of real property in Scotland, if valid according to English law, will be decreed to be specifically performed (*h*), and will also be enforced by the Courts in Scotland (*i*).

Money to a limited amount may be advanced, at interest, out of the consolidated fund "for the support of any collieries or mines" (*k*).

(*f*) Williams *v.* Attenborough, Turn. & Russ. 70.

(*g*) 28 & 29 Vict. c. 99.

(*h*) Arglasse *v.* Muschamp, 1 Vern. 75; Jackson *v.* Petrie, 10 Ves. 165.

(*i*) Weir *v.* Laing, 1 Ross, L. C. 10; Brack *v.* Johnston, 5 Wilson & Shaw, 61.

(*k*) 5 & 6 Vict. c. 9, s. 11.

CHAPTER VIII.

LEASES AND LICENCES.

I. *Mining Leases—General Description.*
II. *Construction of Leases.*
III. *Specific Performance and Equitable Relief.*
IV. *Licences to work Mines.*
V. *Stamps and Registry.*

Section I.

MINING LEASES—GENERAL DESCRIPTION.

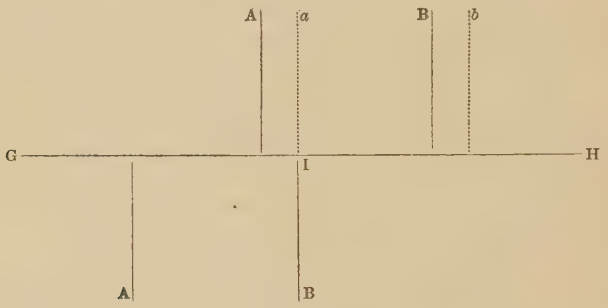
The greatest portion of the mineral districts of the kingdom is worked under leases or licences, and questions of importance are frequently arising with respect to the validity and construction of these instruments. The subject has, therefore, been reserved for distinct consideration.

A lease should, after a proper description of the parties, demise, under an adequate description, the subject of contract. When all the mines or quarries of any particular metal or mineral within certain lands form the subject of demise, no dispute can well arise, except with respect to the actual boundary of the surface, or that below corresponding with the surface. In such cases, all the specified products found within the line of demarcation will belong to the lessee. But metals are usually deposited in veins or lodes; and not like coal, which is always found in a state of stratification, corresponding, more or less, with the form of the surface. In such cases it is not an uncommon

practice to demise all the minerals within certain surface bounds; but it is also usual to demise only particular veins, or known, or supposed deposits of metalliferous substances. These veins are demised for a certain length, and with a proportionate and adequate breadth. When there is only one adventure in operation within the same field little difficulty is experienced; for if a new vein is discovered in the course of the workings, the right to which it is desirable to acquire, this desire may usually be gratified without infringing upon the rights of other adventurers. But the lessor may, in some cases, be induced to withhold any further extension of the grant, though, it must be acknowledged, that, in general, the conduct of extensive owners towards mining adventurers is marked by great liberality and fairness of dealing. It also often happens that many of the veins, which may have been traced from a greater or less distance, are actually in lease at the same time, in the same parcel of ground. Thus, veins in the possession of different lessees may actually intersect each other; or, if not intersecting each other, the veins may, at any rate, come within the boundary prescribed for the proper breadth in each demise, or they may run into a district comprised in a deed of general grant. In such cases there can be no doubt that the *first* grant must be sustained in all its vigour. *Qui prior est in tempore, potior est in jure.* The second lessee cannot claim what has been already granted to the first. But the difficulty is frequently only half solved by this plain rule of law. It may, in many cases, be exceedingly difficult to ascertain the *identity* of a vein, and a vein may be improperly or imperfectly described in the grant.

These difficulties may also be increased by the nature or disturbance of the stratification of the earth. It would be impossible, in a treatise of this description, to give any accurate idea of the difficulties which might be occasioned by imperfect description; or to enter into any enumeration of the geological phenomena which might render the

clearest description of no avail in ascertaining the rights of the parties. To instances of the first kind there are no limits but those prescribed to the imperfections of language—and Nature, in her subterraneous operations at least, is not more to be depended upon for regularity of proceeding. Thus, the course of two different veins may be interrupted by the intersection of a strong cross vein, which may produce unavoidable confusion. Suppose, for instance, the line G H, in the figure below, to represent the cross vein, or disturbing vein.



The vein B may be pursued up to the point I, where the cross vein causes it to be carried away far to the right. The workings may, however, be continued in search of the vein in an opposite direction. The vein A, which has experienced a similar fate, may be easily mistaken for the continuation of the vein B. In one case, which occurred in Yorkshire, the other vein happened exactly to correspond with the vein worked up to the disturbing vein, as represented in the dotted line *a* I. A long time elapsed before the mistake was discovered, and the different veins were properly identified. But it is not only in the exploration of metalliferous veins that the mining adventurer is exposed to unpleasant encounters of this description. The same result may take place even in the working of minerals found in a stratified state, and which are justly considered to be easier of search, though not always easier of attainment. For instance, a well-ascertained stratum of coal

may be the subject of accurate description and demise. There would appear to be little difficulty in such a case. But the whole stratification may be affected in a manner similar to the case just mentioned by an intersecting *dyke*, or vein of extraneous matter. Different strata of coal may have the same horizontal position on both sides of the disturbing dyke; but they may be totally changed in their relative situation to each other on each side. Thus, an upper stratum of coal may be thrown down so far as to correspond with the third or fourth stratum downwards on the other side; and these different but adjacent strata may be of the same thickness and quality, and may, in their general character, possess points of almost entire resemblance and identity. Such mistakes are often inevitable during the process of boring or experimenting for coal; and even when the coal is actually in the course of working it is possible that the error may still continue for a considerable time. The consequences resulting from such causes may be very serious. Veins and strata may be unconsciously worked by those who may, under circumstances of great hardship, be unexpectedly called upon to give up the produce of their successful labours to others who have established a superior claim. Again, the minerals may be fraudulently and violently extracted by persons who are conscious of their want of title, but who may disguise or pervert the facts, and take shelter under the colour of a legal claim. Disputes may arise, the law may be appealed to, and an expenditure, which may require almost the wealth of a prosperous mine to satiate, may be incurred; and it may happen after all, that when the rights of the parties have been adjusted by the judgment of the law, the offenders may have found means to evade the consequences by a timely distribution or expenditure of the property. The utmost that can be done in the preparation of a demise for avoiding any of these consequences is to render the description as clear and intelligible as possible. The rest must be left to be decided by the test

of actual experience; and, in case of doubt, it will be for a jury to determine in whose favour the evidence preponderates (*a*).

It is usual to describe the subject of demise by reference to a plan. When a plan is incorrect, the description in the deed may be assisted by a proper amendment of the plan. In a case of this kind, the southern boundary was described in the deed as a straight line drawn from a certain house to a certain bound stone, with reference to an indorsed map. On this plan the line appeared to be drawn from the north-east corner of the house. In an action of trespass for working ore brought by an adjoining lessee, parol evidence was admitted to show that the house was wrongly placed on the map, and that, if corrected, the line would run to the south of the house—and the whole question was left to the jury, who found for the south-east corner. The Court of Q. B. decided that the whole evidence was properly left to the jury. This decision was reversed in the Exchequer Chamber on the ground, that it was for the judge to construe the deed, that, as the plan was not repugnant to the words in the deed, there was no room for evidence to show what the meaning of the plan was, and that the plan showed clearly that the boundary ran from the north-east corner. This last decision was confirmed by the House of Lords. Lord Westbury dissented from this view, on the ground that there was no absolute or independent statement that the line of boundary was to run from the north-east corner—that, as soon as it was shown that the site of the house was wrongly laid down in the plan, the relative position of the house and boundary line was disturbed, and it became impossible to know whether the line did or did not hit the north-east corner of the house according to its true locality—and, therefore, that it was a question of fact to be ascertained

(*a*) See Davis *v.* Shepherd, 35 L. J., Ch. 581, and Chap. VIII.

by evidence by the jury, and not by construction of the Court (*b*).

After describing the subject matter, the instrument usually demises the full liberty to work the mines, and often, in demises of metalliferous veins, to smelt the ores, and to erect washing and smelting apparatus, and to effect several other dependent purposes. It has been seen before, that the right to work mines is necessarily incident to the grant without any express authority for that purpose, and that this power cannot be restrained by a special power given in the *affirmative*, which may authorize more acts than would be implied by law, but which will in nowise exclude the full operation of law—and that a grant or lease of mines will be attended with all the rights and incidents which may be necessary for the full enjoyment of the thing granted, unless any of those rights and incidents are restrained by express stipulation (*c*). Such incidents, therefore, as these, need not be specified in a lease, though it is always preferable to leave no room for dispute. But all other rights must be expressly mentioned; for, however important they may have been in the contemplation of the parties, they are not strictly necessary for the full operation of the grant or lease. In short, all not obviously implied by law, and which are intended to be conferred, should be clearly expressed on the face of the instrument.

It may be often very important to make special stipulations with respect to rights of way. A right of way is incident to every grant, in cases where the grantor has the power to confer it. But it frequently happens that some required deviations from the proper course, some proposed alterations in the general condition of the property, or some particular mode or plan of shipment or delivery, demand a more particular arrangement. It may also here be ob-

(*b*) Lyle *v.* Richards, 35 L. J., Ch. 214.

(*c*) See Chaps. IV. & V.

served, that in leases of the surface, the grantor should, in all mining countries, make such reservation with respect to rights of way as may seem to be probably required for mining operations. If the minerals in the lands are reserved to the grantor, the tenant of the surface will then never have been in the possession of them. The exception will be construed as a grant, and a right of way will of course be presumed by law. But this right will not extend to minerals produced in the lands of others. Way leaves, in many mining districts, are of very great annual value; and when they are likely to be required, they should always be properly reserved in all farming leases. It will be the duty of every prudent lessee, before he is far embarked in a mining speculation, to secure to himself all the necessary rights of way which may be required to be obtained from other persons as well as from the grantor of the mines.

If any parts or rights are to be *excepted* to the grantor, they should be set out and particularly described before the insertion of the habendum. Thus, if lands are demised at the same time with the mines, it is usual to except the trees and underwood; but the most important exceptions consist of distinct parts of the minerals which are intended to be reserved to the grantor. When minerals, *different* from those demised, are excepted out of the demise, there can be little difficulty as to the subject matter of the exception, though many difficulties might occur in the mode of working under both the demise and the exception. But when the minerals excepted are of the same name and nature as those demised, it will be necessary to make the description both of what is demised and what is intended to be excepted sufficiently clear and express. Enough has already been said upon the necessity of accurate description in mining leases.

It has been before stated, that an exception is to be construed as a grant, and therefore the same rights necessary for a full enjoyment of the subject of exception will be

implied by law. But it has been also stated, that a grant is always to be taken most strongly against the grantor. There is, therefore, an additional reason why the language of exceptions should be full and clear, and why any other rights intended to be reserved should be expressly defined. Thus, in general, it is presumed the mining operations under the exception must be carried on so as not to interfere with the working of the parts demised; for, otherwise, it would be in the power of the grantor to derogate from the force of his grant. This can only be allowed by express terms.—For *expressum facit cessare tacitum;* and a grantor may thus modify his grant in any manner suited to his purposes. In short, it will be the duty of the grantor or lessor, who reserves to himself anything out of his grant or lease, to observe that he does not in any way deprive himself of taking the full advantage of the thing reserved; and it may in some cases be advisable for him to secure even a superior advantage, if he has reason to contemplate any collision of interests.

It is also very usual for lessors to reserve rights of way for general or special purposes, both above and below the surface. In like manner, also, the grant often confers on the lessee rights of this kind.

It is not unusual to include in the exception liberty to the lessor and his agents to visit the works. This right is more generally, perhaps, reserved by covenant—a mode equally effective, and in many respects preferable. It has been thought that a power of inspection, if not inserted, may be supplied by custom (*c*).

After the exception comes the *Habendum*, which should accurately state, if the lease be for years, the number of years intended for its duration, and the period of its commencement; if for lives, the number, names and description of the *cestuis que vie*. In the latter case, it must be remembered that the lease cannot begin at a day to come;

(*c*) Blakesly *v.* Wielden, 11 L. J., N. S., C. C. 166; 1 Hare, 176.

for a freehold interest is created by it, and a freehold cannot be made to commence *in futuro* (*d*). It may be observed, that a lease may be granted for different periods of years, as, for instance, for seven, fourteen or twenty-one years, and that, in the absence of any other agreement on the face of the deed as to duration, the lessee only will have the option at which of the periods the lease shall determine (*e*). The habendum should also express, when there are more lessees than one, whether it is intended they should take as tenants in common, or as joint tenants. When the lessees are numerous, it may be advisable to adopt the latter mode; in other cases, the former mode may be used, except in the grant of freehold interests of inheritance, where it is desirable to obviate as far as possible the descent of any portion of the legal estate upon infant heirs. In either case, however, the equitable rights of partners will remain the same; for the lessees will be only trustees on behalf of all persons having or acquiring shares in the property.

The *Reddendum* or reservation of rent forms, in general, the consideration for the granting of the lease.

It is said that a reservation of rent must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, for that would be an *exception* out of the grant, and not a rent reserved (*f*). It would appear, therefore, that when, as is very usual in leases of metallic veins, the reservation consists of some proportion of the mineral in its natural state, there will not be strictly a rent, but an exception. The consideration in such cases will simply consist in the extraction and delivery of the part excepted to the lessor. There can be no distress for such a species of rent. No render, however, will of course be due till the mineral is severed from

(*d*) Pugh *v.* Leeds (Duke), Cowp. 710, 725; Freeman *d.* Vernon *v.* West, 2 Wils. 165.

(*e*) Dann *v.* Spurrier, 3 Bos. & Pul. 399, 442; Price *v.* Dyer, 17 Ves. 356; Doe *d.* Webb *v.* Dixon, 9 East, 16.

(*f*) Co. Litt. 47 a, 142 a.

the land; and when that is effected the lessor may recover the proper proportion by an action either of trover or in respect of the covenants of the lessees. A bill in equity for an account may also be maintained. But a special power of distress is usually inserted in the covenants.

If the reservation is of a proportion of the mineral in its smelted or manufactured state, it will constitute a legal rent, subject to the usual incidents (*g*).

Rents are generally payable in money in demises of quarries or open workings, and are often payable for mines. In mines of coal the render is also usually in money, and, in many instances, made to vary with the market price of the article. In the extensive coal districts of the north of England, the demise is usually made subject to an annual certain rent, and also to what is called a tentale rent. A ten is a local measure, equal in weight to about forty-eight tons and a half. The lessee pays rent at a specified rate for every ten of coals which is worked by him, till he has worked such a number of tens in the year as to make the payments in respect of them amount to the full certain rent mentioned in the demise; and after that period, he still continues to pay rent at the same rate for every ten which he may afterwards raise in the same year. Thus, the annual certain rent is payable to the lessor at all events, whether the mine be worked to the extent which would make up the rent at the rate mentioned, or not, and in fact, whether the mine is worked at all or not. But the lessee has also the right to make up the number of tens when the quantity raised has not kept pace with the rent represented by them during any subsequent period of his tenancy, without any further payment. In other parts of England, a similar system prevails with respect to coal mines. Sometimes the rent of a certain sum for every ton is payable; but in case the rent thus payable shall not amount to a

(*g*) Co. Litt. 142 a.

certain sum in every year or part of a year, then the deficiency is to be made up by a further payment, unless the mine shall be incapable of producing to the extent which would be required for yielding the landlord's rent. The lessee is still left at liberty, during any subsequent period of his lease, to work a quantity of coal equal to the deficiency for the time being, without further payment. In other districts, a distinct proportionate part, as one-seventh of the money realized by the sale of the coal which is raised from time to time is reserved, with such an additional sum, if required, as may always yield to the lessor a certain fixed rent, unless the mines are incapable of producing a specified number of tons in the week. This proportion, however, varies indefinitely, according to the nature of the operations, the supposed risk, the amount of expenditure, and the general circumstances of the case. Special renders are made for outstroke rights, way leaves for general purposes, and other privileges.

The rents made payable in respect of metalliferous mines are almost invariably proportioned to the quantity of ore actually raised, and without any stipulated certain rent in money. This rent is called the duty ore, or the lot ore, or the lord's dues. It is a common practice to stipulate that the rent shall be paid in money according to the market price of the day, or by delivery of the metals in a manufactured state. Thus, in demises of lead mines the reservation may consist of a certain quantity of smelted lead and of the silver actually extracted from the ore. In all such cases, an adequate allowance is made in the amount of reservation for the expense saved to the lessor in selling or smelting his proportion of the produce. But it is a frequent practice to stipulate for the lord's proportion of mineral to be rendered when it has been washed and cleansed by the lessee, and before it has undergone any process of manufacture, by which its quality is changed. The proportion to be rendered to the lessor differs not

only with respect to the nature of the metals and substances which are discovered, but also to the circumstances under which they are produced.

These rents, not becoming due at fixed periods, are not within the Apportionment Act, 4 & 5 Will. 4, c. 22 (*h*). But dead or certain rents are within the act (*i*).

It may be observed, that when there is a demise generally of all metals and minerals, the reservation should correspond with the different substances demised. The render is generally adapted to what is known or supposed to be discoverable in the land, but it may easily happen that, under a general demise of the minerals, other substances, besides those which may be mentioned in the clause of reservation, may be met with, and these might be worked without any profit accruing to the lessor. If, on the other hand, there was a general proportion specified for all minerals found within the limits, it might still happen that many kinds of substances would be worked with injury either to the lessor or lessees. Thus, a render of the average amount of lead duty for copper would subject the lessee to much harder terms than are usual in such cases, and the contrary would prove equally disadvantageous for the lessor. As a general rule, it may be observed, that there should be either no general demise of minerals, without providing for the proper amount of rent in each case, which, with respect to all but the leading and most valuable minerals, may be done in general terms, or the amount of rent should be such as sufficiently to protect the lessor, whatever may be the result of the discoveries. Lessees, in general, know with tolerable exactness what description of substances they may expect to meet with in the course of their enterprize, and will generally take care that these substances are included in the grant, and that the rent re-

(*h*) St. Aubyn *v.* St. Aubyn, 1 Drew. & S. 611; 30 L. J., Ch. 917.

(*i*) Bridges *v.* Potts, 17 C. B. (N. S.) 314; 33 L. J., C. P. 338.

served is not beyond the usual amount. If other minerals than those anticipated by the lessor are found, although they will by the general description be in the possession of the lessee, yet if the duty payable should prove to be above the usual amount, the lessor will still have it in his power to control the proceedings of his lessees, or to receive an ample remuneration.

It is proper when duty ore or metal is reserved for rent, that the lease should sufficiently express the time and manner of delivery to the lessor. This may be expressed either in the reddendum or in the covenants afterwards entered into, or in both, but it should always be contained amongst the covenants, either expressly, or by reference to the reddendum.

When lands are demised with the mines, it is usual to reserve a surface rent, without reference to the mines.

Next come the *Covenants*, by which the grant may be restrained, modified or regulated; for it is a general rule, that he who has the *jus disponendi* may attach any conditions to his grant which are not unreasonable, repugnant or illegal.

The construction of a covenant is determined by the Court—and it is the duty of a judge to explain its construction to the jury as a matter of law, and to what extent it may be modified by admissible evidence (*k*).

As the law regards only the intention of the parties as expressed by their deed, no particular form of words has been held necessary to constitute a valid covenant (*l*). A recital of that intention even in the preceding part of the deed has been held sufficient. Thus, in a lease of a coal mine, it was recited that before the sealing of the indenture,

(*k*) Griffiths *v.* Rigby, 1 Hurl. & N. 237; 25 L. J., Exch. 284.

(*l*) Holder *v.* Taylor, 1 Rol. Abr. 518, l. 19, 41; Bush *v.* Coles, Carth. 232; Salk. 196. See Russell *v.* Galwell, Cro. Eliz. 637; James *v.* Cochrane, 8 Exch. 556; 21 L. J., N. S., Exch. 232; Rowbotham *v.* Wilson, 30 L. J., Q. B. 53; 8 E. & B. 123.

it had been agreed that the plaintiff should have the third part dug. It was decided by Lord Chief Justice Hale, that this amounted to a covenant (*m*).

A covenant, like a grant, in cases of doubt, is always taken most strongly against the person making it (*n*).

Many covenants will be implied by law, as for the payment of rent, and for the quiet enjoyment of the lessee.

The usual covenants in mining leases, on the part of the lessee, are:—That he will pay the stipulated rents and the taxes—pay for all damages occasioned—cause all the minerals to be weighed—deliver periodical accounts—keep plans of the workings—allow the lessor and his agents to inspect the works—work the mines in a proper manner—with special stipulations as to open pits and injuries—permit the lessor to enter—not assign or underlet without leave in writing—and give up the possession of the mines in good condition at the end of the term. In leases of coal there are special covenants with respect to leaving barriers, and securing from injury the levels and passages.

The remaining intentions of the parties are usually effected by provisoes or conditions. These differ from covenants in this respect, that they are binding on both parties, and a covenant only binds the covenantor. It may often, however, be preferable to have also mutual covenants. When there is no penalty affixed to the non-performance of it, as a clause of re-entry, it will amount to a covenant (*o*). A proviso, indeed, in many instances, will operate as a covenant. The usual provisoes are, that the lessor is to have the option of purchasing the tolls, materials and machinery at a fair valuation, or otherwise the lessee is to be entitled

(*m*) Severn *v.* Clark, 2 Leon. 122. See Hollis *v.* Carr, 2 Mod. 87; Duke of Northumberland *v.* Errington, 5 T. R. 526; Saltoun *v.* Houston, 1 Bing. 433; Sampson *v.* Easterby, 9 Barn. & C. 505; 6 Bing. 644; 4 Moore & P. 601; 1 Cromp. & J. 105; Wood *v.* Copper Miners' Company, 7 Com. B. 906; 18 L. J., N. S., C. P. 293.

(*n*) Bac. Abr. Cov. F.

(*o*) Doe *d.* Wilson *v.* Phillips, 2 Bing. 13; 9 Moo. 46. See Simpson *v.* Titterell, Cro. Eliz. 242; Doe *d.* Antrobus *v.* Jepson, 3 Barn. & Ad. 402.

to remove them—for re-entry or non-payment of the rent —and for referring all disputes to arbitration.

An agreement for arbitration, which absolutely excludes the jurisdiction of the superior courts, will not be allowed to be pleaded in bar to an action (*p*).

It is now usual to introduce a power for the lessee to abandon the mines and determine the lease, at the end of any one year, or at certain specified periods. Many of these provisoes are very defective. In particular, great care should be taken in not making the power to depend upon the absolute fulfilment of all the terms and covenants of a lease, so as to produce a condition precedent. For it is hardly too much to say that no mining lease is *exactly* complied with. The proper course is to make the power wholly independent of any breach of covenants, and to leave the breaches to the usual legal remedies (*q*).

It is usual for the lessor to enter into covenants for quiet enjoyment, and for further assurance. But it would be very proper for him also to enter into covenants for title. For when great expenditure is incurred by lessees, they may be truly regarded as purchasers (*r*). The law for some purposes already so considers them. When no investigation of title takes place, which is often as imprudently waived as it is needlessly withheld, there is further reason for these covenants to be inserted.

Such may be considered to be the usual contents of a mining lease; but there are few occasions which do not demand more particular explanations and agreements.

For instance, in leases of coal mines, it is frequently expressed that during any suspension of the works by any inevitable accident, the rents shall cease to be payable, and that in case of a partial suspension the rents shall be apportioned—and, generally, that the mines may be shown, within a certain period from the termination of the term,

(*p*) Horton *v.* Sayer, 4 Hurl. & N. 643; 29 L. J., Exch. 28. See Chap. XIII.

(*q*) See Appendix and the next section.

(*r*) See next chapter.

to persons who may be desirous to become the tenants, and take demises of them—that the lessor, if required, will grant a new lease to the same party—that the lessee shall erect certain buildings for particular or general purposes, and certain steam-engines of defined power and application, and other works and machinery—and that the mine shall be worked in a certain prescribed manner.

Forms of mining leases will be found in the Appendix.

Section II.

CONSTRUCTION OF LEASES.

It is not within the province of this treatise to enter upon the general law relating to leases. The reader is referred to the express treatises upon the subject (*s*). It must suffice to confine attention to our immediate subject.

In the first place, there are many conflicting cases with respect to the words which create a present demise, or only an agreement for a demise. When there are words of present demise, or when it is expressed that possession is to be taken, the instrument will amount to a lease, unless there is some manifest contrary intention, or something remaining to be done before a lease is concluded (*t*).

In an action of replevin, it was stated to have been agreed by parol, that the plaintiff should take a house at a certain yearly rent, and that he should pay yearly at the rate of 8*d.* a yard for all the marl that he got, and also at the rate of 1*s.* a thousand for bricks made by him on the land. No distinct demise of the marl was proved, but the marl and slack pit was stated to be connected with the

(*s*) See Bacon's Abr. Leases; Chambers on Leases; Woodfall on Landlord and Tenant, by Harrison; Coote on Landlord and Tenant.

(*t*) Morgan *v.* Bissell, 3 Taunt. 65; John *v.* Jenkin, 1 Cr. & M. 227; Jones *v.* Reynolds, 1 Q. B. 506; 10 L, J., N. S., Q. B. 193.

house. It was contended, that there was only a licence, and not a demise which could yield rent. But it was held, that there was a demise at a rent sufficiently certain, and that a distress could be made for it (*u*).

In another instrument, it was stated, that the owner agreed to let and grant a lease of coal and iron mines at certain tonnage rates, for seventy years, from the day of date, with a certain rent of 50*l.*, to commence in a year from the sinking of a certain pit. The lessees then bound themselves to begin the pit before a certain day, and the owner engaged that he had not incumbered the estate to prevent him entering into a lease on the above terms, which was to contain the usual covenants, and also engaged to sign a lease as soon as it could be prepared. There was also a power to deposit rubbish and make a wharf. It was held, that the instrument did not amount to a lease; for it neither contained words of present demise, nor was accompanied with possession, and it also affected incorporeal rights, which could only pass by deed (*v*).

It has been before stated, that a power to abandon the demised mines should not be made to depend on the performance of all the covenants. Thus, it was provided in a lease, that if the lessees should be desirous to quit, and should give notice, then, "all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed, this lease and everything herein contained shall, at the expiration (&c.), cease, determine, and be utterly void to all intents and purposes. in like manner as if the whole of the said term of forty-two years had then run out and expired, but nevertheless without prejudice to any clause or remedy which any of the parties hereto or their respective

(*u*) Daniel *v.* Gracie, 6 Q. B. 145; 13 L. J., N. S., Q. B. 309.

(*v*) Morgan *v.* Morgan, 14 L. J., N. S., C. P. 5.

representatives may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." It was held by the Court of Queen's Bench, that the performance of all the covenants was a condition precedent, and that the latter part of the clause was only introduced for greater caution, as regarded the right of the lessor to sue for breaches which might be unknown to him, or possibly to meet the case of the lessor acquiescing in the notice given by the lessees, although the condition precedent might not be performed; and, further, that the words were applicable to any of the parties, and preserved the rights of the lessees for any breach of the lessor (*w*). On judgment being given on demurrer, a trial at nisi prius took place, when the jury found the breaches, and assessed damages. On a writ of error being brought, the judgment below was reversed in the Exchequer Chamber on a defect in pleading, but with an opinion that the performance of the covenants was not a condition precedent (*x*). Another action was then brought in the Court of Exchequer, when it was decided, accordingly, per Lord Cranworth, that the words in question so qualified the condition as not to make it precedent (*y*). A writ of error was again brought, and it was decided, that there was a condition precedent (*z*). Finally, the case came before the House of Lords, assisted by eleven judges, when the last judgment of the Exchequer Chamber was affirmed in favour of the lessor. Three only of the judges dissented from this decision. Lord Cranworth, in moving judgment, said he still remained of the same opinion which he had expressed in the Court of Exchequer, but that Lord Brougham, the only other law lord who had heard the argument, differed from him (*a*).

(*w*) Friar *v.* Grey, 17 L. J., N. S., Q. B. 301.

(*x*) Ibid., 5 Exch. 584; 19 L. J., N. S., Q. B. 393.

(*y*) Ibid., Exch. 368.

(*z*) Ibid., 20 L. J., N. S., Exch. 365; 5 Exch. Rep. 597; 4 H. L. Cas. 565.

(*a*) H. of L. Cas. 565. See Porter *v.* Shepherd, 6 T. R. 665; Greene *v.* Sparrow, cited 3 Swanst. 408.

In like manner, the proviso for re-entry should be limited to the nonpayment of rent, and to some special causes, which may enable a lessor to become freed from objectionable adventurers. For a lessee may inadvertently expose the lease to forfeiture (*b*), and he cannot claim relief against forfeiture on any other ground than nonpayment of rent or of sums certain, unless the forfeiture has been occasioned by inevitable accident (*c*). The same remark applies to covenants for renewal of leases (*d*).

Forfeiture may be incurred by the breach of conditions implied by law; but upon this subject it is not necessary to enter in this place. It is more usually incurred by those acts which are provided for by the express agreement of the parties. In cases of forfeiture, the lessor will be entitled to enter again as of his old estate, and eject the lessee, or to recover excessive damages for the injury sustained.

The usual proviso for re-entry declares that on breach of any of the covenants or conditions on the part of the lessee, the lease shall absolutely cease and determine, and become void to all intents and purposes. It must be observed, that there was always a difference in this respect between grants for freehold interests and grants for terms of years. The former were created by livery of seisin; and on account of the solemnity of the conveyance, they could only be determined, after breach of the condition, by the entry of the lessor or those claiming under him (*e*). Leases for years, on the other hand, were considered *ipso facto* void on the breach, without entry at all (*f*).

(*b*) Bowser *v.* Colby, 1 Hare, 109; 11 L. J., N. S., C. C. 132.

(*c*) Bracebridge *v.* Buckley, 2 Prince, 200; Hill *v.* Barclay, 16 Ves. 402; Webber *v.* Smith, 2 Vern. 103; Rolfe *v.* Harris, 2 Price, 206; White *v.* Warner, 2 Mer. 459; Green *v.* Bridges, 4 Sim. 96; Thompson *v.* Guyon, 5 Sim. 6; Lovat *v.* Lord Ranelagh, 3 Ves. & B. 24; Wadman *v.* Calcraft, 10 Ves. 67.

(*d*) Job *v.* Banister, 26 L. J., Ch. 125; 2 Kay & J. 374.

(*e*) Browning *v.* Beston, Plowd. 135.

(*f*) Co. Litt. 215 a; Finch *v.* Throgmorton, Cro. Eliz. 220; Mulcary *v.* Eyres, Cro. Car. 511.

This was the old doctrine upon the subject. But it is now clearly settled, that these provisoes for re-entry, even in demises for terms of years, are not to be construed with all the strictness of common law conditions, but like other contracts, the breaches of which may be sanctioned, and the consequences waived, by the acts or agreements of the parties (*g*). A contrary rule would have violated one of the first principles of law, that a man shall not take advantage of his own wrong.

This rule was first established in a mining case, where it was held, that where a lease is declared to be void on non-performance of any of the conditions, it is only voidable at the option of the lessor. The circumstances were these:—

A lease of coal mines was granted for ninety-nine years, with a proviso that the works should begin within a year from the date thereof, and if they should cease working at any time for two years, the lease should be deemed void to all intents and purposes. The mine was, in effect, abandoned in May, 1813. In May, 1815, May, 1817, and April, 1819, the lessee raised a few tons of little value, for the purpose of preserving the lease. At Michaelmas, 1817, the lessor received rent, and gave a full receipt. A special verdict was found, that since 1813, the workings had been temporary, collusive and fraudulent. On a motion to enter a nonsuit, it was held, that, notwithstanding the language of the lease, it did not become absolutely void by a cesser of two years, unless the landlord thought fit to make it so. If it were held otherwise, even where it was made to appear that there had been a continuance of the receipt of rent afterwards, the consequences might be, that when the landlord at an advanced period brought his action of covenant, he might be told that he had no right to maintain the action, on the ground that the lease had become void

(*g*) Doe *d.* Davis *v.* Elsam, Mood. & Malk. 189; Doe *d.* Green *v.* Baker, 2 Moore, 189; 8 Taunt. 241; Arnsby *v.* Woodward, 6 Barn. & C. 519.

by forfeiture many years before. The tenant could not insist that his own act amounted to a forfeiture (*h*).

In a recent case, it was also decided, under somewhat similar circumstances, that the word *void* in demises for years meant *voidable* at the election of the grantor. A licence was granted for twenty-one years, to dig for tin and other ores, subject to the condition that if the lessee should neglect effectually to work the premises granted for any time or times exceeding in the whole six calendar months in any one year of the term, or should not work effectually the mines and veins, unless hindered by inevitable accident, then the indenture and licence should be void to all intents and purposes. A breach of the condition was alleged, and an action of trespass was brought by the owner of the land against a workman of the lessee. It was held, that the instrument was liable to be rendered void only at the election of the grantor; and that, in order to avoid it, it ought to have been shown that the original grantor or somebody claiming under him had done some act to determine it (*i*).

It is a general rule, that a forfeiture of a lease will be waived by the landlord receiving rent after the occurrence of the event (*j*). But a subsequent act of forfeiture will, of course, afford a new opportunity of determining the interest of the lessee. A grantor may elect, in every case, whether he will take advantage of any particular act of forfeiture by the lessee. It follows, therefore, that in cases where there are continuing acts of this description, the lessor may postpone his remedy to an indefinite period; and that the receipt of rent will not prevent him from asserting his right the very next day.

(*h*) Doe *d.* Bryan *v.* Bancks, 4 Barn. & Ald. 401. See also Doe *d.* Boscawen *v.* Bliss, 4 Taunt. 735.

(*i*) Roberts *v.* Davey, 4 Barn. & Ad. 664; 1 Nev. & M. 443. See also Rede *v.* Farr, 4 Barn. & Ald. 401; Dakin *v.* Cope, 2 Russ. 170; Arnsby *v.* Woodward, 6 Barn. & C. 519.

(*j*) Arnsby *v.* Woodward, 6 Barn. & C. 519; Dakin *v.* Cope, 2 Russ. 170.

Thus, in the case of Bryan *v.* Bancks (*k*), just cited, where the lease was to be void at the end of any two years, during which there had been a continued cesser to work, it was observed by Bayley, J., that the effect of the receipt of rent could not amount to more than an acknowledgment on the part of the lessor, that no forfeiture was then complete. The landlord had it in his election to make the lease void or not; he was not bound to exercise that election in the first instance; and though he might waive it from time to time, he was at liberty afterwards to insist on the forfeiture in respect of subsequent misconduct. He was of opinion, that the receipt of the rent in September, 1817, did not destroy the right of the lessor to take any part of the period between September, 1815, and September, 1817, as a period in which a forfeiture was inchoate and beginning; and that if the cause of forfeiture continued, he was at liberty to add to that the subsequent period from September till March following, so as to complete the period of two years. Holroyd, J., observed, that ceasing to work for two years after the 29th of September, 1815, could not make a forfeiture until after the expiration of the day of the 29th September, 1817. Now, that was not inconsistent with the receipt of rent on that day; for, supposing it to be a receipt of rent under the lease, still the landlord might consistently say that the lease was forfeited on the 30th September, or the 1st October, 1817, for two years' cesser of work prior to either of those days. Although the landlord, by receipt of rent on the 29th September, 1817, might have admitted that the lease was existing on that day, yet he might avoid it on a forfeiture which became complete at a subsequent period (*l*).

Cases of forfeiture, however, are construed strictly both by Courts of Law and Equity. It has been held, that a

(*k*) Supra.

(*l*) See also Doe *d.* Ambler *v.* Woodbridge, 9 Barn. & C. 376.

forfeiture, however distinct, may be waived by the act of the lessor, as, in general, by distraining for rent, or bringing an action for the payment of it, when it has become due since the forfeiture was complete, or by acceptance of such rent (*m*). But the lessor must have notice of the forfeiture, unless the condition be of such a nature as to be equally within the knowledge of both parties (*n*).

If a lessor witnesses a continued act of forfeiture, there is no waiver without some positive act; but if he permits the tenant to expend money in improvements, it will be for a jury to say whether evidence of that fact would amount to proof of his consent and concurrence (*o*). A forfeiture occasioned by omission to do a thing after notice is suspended, but not waived, by an agreement to allow further time (*p*).

Forfeiture may, of course, be waived by the express parol agreement of the lessor (*q*).

A waiver will also be produced by any affirmance or recognition of a subsisting tenancy (*r*), as by distress, or by acceptance of rent due after notice, but not of rent due before notice (*s*).

Acts of negotiation may also amount to sufficient evidence that the lessor has elected to treat a lease as still subsisting (*t*).

A lessee might formerly be relieved from the forfeiture by an offer of the rent at any time, even after ejectment. But by stat. 4 Geo. II. c. 28, it is enacted, that if the tenant shall suffer judgment and execution, without pay-

(*m*) Doe *d.* Ambler *v.* Woodbridge, 9 Barn. & C. 376; Doe *d.* Bryan *v.* Bancks, supra; Kennersley *v.* Orpe, 1 Doug. 57; Arnsby *v.* Woodward, 6 Barn. & C. 519.

(*n*) Doe *d.* Gregson *v.* Harrison, 2 T. R. 431.

(*o*) Doe *d.* Sheppard *v.* Allen, 3 Taunt. 78.

(*p*) Doe *d.* Rankin *v.* Brindley, 4 Barn. & Ad. 84. See also Doe *d.* Lord Kensington *v.* Brindley, 12 Moore, 37.

(*q*) Doe *d.* Henniker *v.* Watt, 8 Barn. & C. 308; 1 Man. & R. 694.

(*r*) Doe *d.* Sheppard *v.* Allen, supra; Doe *d.* Scott *v.* Miller, 2 Car. & P. 348.

(*s*) Ward *v.* Day, 5 B. & S. 359; 33 L. J., Q. B. 3, and 254.

(*t*) Ibid.

ing the rent and arrears with full costs, and without filing any bill for relief in equity within six calendar months after execution, he shall be barred from relief. But if at any time before the trial he shall pay or tender the rents and costs, the ejectment shall be stayed.

On filing a bill a tenant shall not have relief against proceedings at law without payment into Court within forty days after answer. But it has been held, that a lessee is not obliged to make such full payment if the lessor is in possession, and the lessee asks for no relief before the hearing (*u*).

It was also held, by Wigram, V. C., in the case last cited, that an equitable assignment of a lease, not sufficient to avoid it at law, and not involving change of possession, was not a ground for refusing relief. In the absence of authority on the subject of relief, in such cases, reference was made to the conduct of the lessors, and to analogous cases of specific performance precluded by the acts of the claimants. It was also stated to be a settled rule, more strictly applicable to mining property than to any other, that a party who witnesses a breach of contract by another, and, instead of applying promptly for relief in equity, permitted the alleged wrong-doer to proceed in his acts, incurring expense and liabilities, would be considered as having waived the wrong he complained of, and would be left to his legal remedies. The result of the suit was made to depend on the right of defendants to enter and determine the lease at the time when judgment was recovered in the ejectment; and issues were directed to ascertain if the lessee had broken the covenants, except as to rent, and if the lessors had waived the forfeiture.

But, at law, the notice of forfeiture must not depend on a contingent event (*v*).

It remains to be seen in what manner the right of the

(*u*) Bowser *v.* Colby, supra.

(*v*) Muskett *v.* Hill, 7 Scott, 855; 5 Bing. N. C. 694.

lessor to determine a lease, upon forfeiture, should be exercised.

It is not absolutely necessary, under provisoes of re-entry, that there should be an actual entry by the grantor to put an end to the estate granted. This object may be effected by the entry of persons claiming interests or authority from the grantor. If the acts of these persons, or of the grantor himself, would have amounted to a trespass in the lands of a stranger, they will be considered as tantamount to an actual entry by the grantor.

A licence for twenty-one years was granted to several persons to work for tin and other mines in the county of Cornwall, on the usual terms, and with a proviso for re-entry in case of neglect or failure in effectually working the mines, unless prevented by water or inevitable impediment. The surface of the lands was occupied by the lessor and his tenants. The lessees in July, 1806, made an adit or level from the sea, upon the level of the sea, into the land, and, after cutting a space of seven or eight fathoms, they came to a vein containing a small quantity of copper ore. The vein was then worked towards the west, and a small quantity of copper was obtained, but none was sold, and no profit was made, and none of the dues were ever paid to the lessor. One of the lessees afterwards pointed out and marked a spot within the limits where he intended to sink a shaft down to the adit; but the shaft was never made, and no other work was done within the limits, but the same lessee occasionally worked within the limits until a short period before his death, when he declared it was not worth while to work any more, and directed the materials to be removed, and all the timber to be knocked away and carried off. This was accordingly done, and the sea filled up the entrance of the adit. In October, 1809, another company entered into a negotiation with the owner for a set to be made by him authorizing them to work the mines *throughout part of the lands* described in the licence, which the owner verbally

agreed to make, and settled with the agent of the company for the amount of dues to be reserved. Afterwards the owner pointed out on the lands some of the boundaries of the set to be made to the second company, in the presence of several of the company, and wished them success in their undertaking; and soon afterwards the mining operations were commenced. In July, 1810, the owner became one of another company for exploring and working for tin in lands, part of which were also within the limits of the licence, upon which occasion a memorandum of agreement was entered into. This company proceeded to work, and raised a small quantity of tin, the duties in respect of which were paid to the owner of the lands. In January, 1811, a regular lease was granted by the owner for twenty-one years of the mines agreed to be let to the second company, to one Rowe, on behalf of the second company, and it was stated in the instrument that it was granted in consideration of the surrender of the first lease. This lease was delivered to Rowe, who had been one of the first company, and had procured possession of the licence, and who now delivered it up to the lessor. No surrender of it in writing was ever made. The limits of the lease were not co-extensive with those of the licence, and the works prosecuted under the former instrument were at a distance from the works carried on under the latter, and did not communicate with them. Considerable quantities of copper and copper ore were obtained by the second company, who rendered the dues to the lessor. The case came before the Court upon a special verdict, and one of the points was, whether there had been a re-entry by the grantor, so as to put an end to the first term. Lord Tenterden, in delivering the judgment of the Court, said, that the acts mentioned to have been done by the grantor, and under his authority, amounted to a re-entry under the proviso so as to put an end to the term. It was clear that the grantor had a right to re-enter by reason of the breach of covenant in not effectually working the mines. The acts done, either

by the grantor himself, or under his authority, if done by a stranger, or other person having no right or authority to enter, could be wrongful, and so they would be in the present case, though done by the grantor, if the above grant could be considered to have operated as a demise either of the soil or the minerals, unless those acts were deemed to be in law an entry by the grantor, and a remitter to him of his former estate by a determination of his grant; and the authorities showed that those acts must be deemed to be in law such an entry and remitter. The learned judge then cited authorities from Plowden and Coke (*r*), to show that when a person having a right of entry had done any act which would have rendered him liable to an action, if he had been a stranger, or which would otherwise have been a wrong in him, or if he *commanded a stranger* to commit a trespass, all these acts amounted to an entry. It had been urged, he said, that the words of the last deed, by which it was expressed to be made partly in consideration of the surrender of the former grant, together with the fact of the actual receipt of the latter deed by the grantor from the copartner into whose hands it had come, showed that none of the acts of the grantor were intended to amount to re-entry. But such an effect could not properly be given to these circumstances, and they ought to be considered only as matters of caution, intended to preclude the question which had since been raised (*s*).

It must be observed that the same acts would, according to the above judgment, have determined the estate, if the deed had conferred a freehold interest—if, for instance, it had been a lease for lives. Indeed the whole argument of the Court upon this point seemed to recognize no distinction. It is submitted, there is still a distinction between leases for freehold and for chattel interests, though they have been now decided so far to resemble each

(*r*) Plowd. 92; Co. Litt. 55, 245 b; Winnington's case, 2 Rep. 59.

(*s*) Doe *d.* Hanley *v.* Wood, 2 Barn. & Ald. 724.

other as, in case of liability to become void by breach of condition, to be equally voidable only at the option of the lessor. This distinction has not received much attention; but it may be easily deduced from the nature of the estates created. A freehold interest, as we have seen, was formerly created only by livery, and it could only be divested by the entry of the grantor, or those claiming interest or authority from him. The ouster in such cases must have been express, or clearly implied from the acts of those interested in the reversion, and exercised upon the land. In the above case, even, it appears the grantor was a copartner in their company, and, as such, had an interest in their proceedings and was concerned in their mining operations. On the other hand, a chattel interest for any number of years might, before the Statute of Frauds, have been created by parol, and without any solemnity, and was not till lately required to be under seal. A breach of condition, in such cases, rendered a grant of this description absolutely void. No entry, express or implied, was necessary to put an end to a grant which was considered to be at once determined by a breach of condition. This rule was relaxed in favour of the lessor, for otherwise it was justly conceived that a tenant might take advantage of his own wrong. But it does not follow that the lessor, in exercising his election to take advantage of the forfeiture in cases of chattel interests, should be bound to pursue the same formalities which are required for putting an end to a freehold interest. To what extent this distinction will be acknowledged by the Courts, and what particular acts may be held sufficient to determine a leasehold tenancy voidable at the election of the lessor, it would be difficult perhaps to determine. But the subject might become of great importance with reference to grants of mining fields, the value of which may be seriously affected by the events of a day, and which are often abandoned and suffered to lie dormant without being submitted to

any direct act of ownership for a considerable period. In such cases, the most serious questions might afterwards arise with respect to the determination of the lease. It is quite clear that the acts, which have been already mentioned as sufficient to determine a freehold interest, will be equally applicable to an estate for years. It is submitted, in addition, that a leasehold term for years may be effectually determined by any act of the lessor which may amount to sufficient evidence of his considering the forfeiture to have taken place, and of his intention to take advantage of it. Thus, a notice to the tenant of this intention, or the creation of an interest in the same lands at variance with the former, and with the knowledge of the tenant, or the refusal of rent accruing due after the forfeiture, accompanied with the reasons and refusal, may all be construed as acts of this description. For the lease would have been formerly void *ipso facto*—and for the benefit of the lessor alone, it is now only voidable. There is required no divesting of an interest by entry, but simply some distinct act on the part of the lessor which may place the forfeiture in the condition it was in by the common law. There is, therefore, no analogy in this respect to leases for freehold interests. It must, however, be observed, that a prudent lessor will in all cases prevent the doubts which may arise on this subject, by causing a lease, not determined by effluxion of time, either to be effectually surrendered, or his title to be remitted by an actual entry.

An actual entry upon an estate generally, is an entry for the whole—and if it be for less, it should be so defined at the time (*t*). But an entry into distinct lands will not, of course, be an entry in respect of other distinct lands included in a demise. There may be different breaches, and there must be different entries, or acts equivalent to them; when mines, at first distinct, afterwards communicate with

(*t*) Doe *d.* Tarrant *v.* Hellier, 3 T. R. 170.

each other, they may perhaps, in some cases, be considered as one subject matter, and entered upon accordingly. But this will depend upon the particular facts.

The terms of a demise which contained a condition or covenant to work mines, as far as they ought to be worked, have been held to be satisfied by the lessees having made sufficient trials to show that there are no mines at all which ought to be worked.

Thus, several mines of coal in Lancashire were demised, subject to a covenant that the lessees would forthwith proceed to sink for coal, as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and as in such cases was usual and customary, and immediately erect such fire engines as should be necessary for the above purpose before the 24th of June, 1806, or, in default, to pay to the lessor such a sum as should be fixed by arbitration. Disputes arose soon afterwards, which were accordingly referred to arbitrators, who awarded that the lessees had not performed their covenants in the lease, inasmuch as they had not proceeded to sink for the coal in the manner mentioned in the lease, and had not erected the fire engines at the time appointed, and that in consequence of such nonperformance, the lessees should pay to the lessor 150*l.* for rent for the year ending in June, 1807; that the lessees should work the mines and erect the engines before the 24th June, 1807, and in default, that they should pay to the lessor the yearly rent of 200*l.* as a compensation for the lord's rent reserved by the lease; and that as soon as the pits were sunk and the engines erected, the rent should cease, and the lessees should pay the rent reserved by the lease, and when it should exceed 200*l.* they might retain the excess until they had reimbursed themselves what had been paid for compensation before the colliery was begun to be

worked. The lessees paid the 150*l.*, and before June, 1807, they proceeded to sink for coal. They afterwards desisted, and an action was brought by the lessor, to which the lessees pleaded that they would have continued to work the mines, and would have erected the engines, but that there were no mines of coal in the lands which ought to be worked by any person acquainted with the nature of collieries, or which it was in such cases usual to work, or which would have defrayed the expense of working, and that they had ascertained the truth of these statements by sufficient experiments and trials. It was contended for the lessor, that it was no answer against the award of the umpire as to the breach of the covenant, for the lessees to say that there were no coals, or none worth the expense of getting, but it was held by Lord Ellenborough, C. J., that though it might be no answer to the damages awarded for the breach of the covenant for the time past, in not trying to get the coal, yet it was an answer to any further breach, that they had tried as far as they could and ought to do in the judgment of persons of competent skill in such works, and as far as was usual and customary in such cases, and that no coal could be gotten. It was found upon competent trial to be impossible to get any coal fit to be worked, and no person could be bound to do impossibilities. It was suggested, however, by Bayley, J., that it would be better for the plaintiff, if the case would bear it, to take issue upon the sufficiency of the experiments made by the defendants; and leave was given to amend for that purpose, otherwise judgment would be given for the defendants (*u*).

In a similar case it was also held, at *nisi prius*, that when a tenant is bound to work a coal mine, as long as it was *fairly workable*, he is not compellable to work the mine at a dead loss. It was proved that there were coals

(*u*) Hanson *v.* Boothman, 13 East, 22.

in the mine, but of such a description as would not yield any profit by working them (*v*).

In another case, there was a covenant, with a proviso, that in case the coals, so far as the same could be "fairly wrought," should be worked out at any time prior to the expiration of the term, then the rent should cease. It was held, that it was a misdirection to leave to the jury the meaning of the proviso, on evidence as to the impossibility of working the mine at a profit—and that the question of profit was not within the scope of the proviso (*w*).

In another case, there was a reservation of certain rent and tonnage rents. The coal was not worth the cost of working. A Court of Equity refused to restrain an action by the lessor for certain rent—but would have interfered, if he had sought to compel the working of the mine. It was also intimated, that, if all the coal had been shown to have been got by ancient workings, there might have been a claim for equitable relief against the certain rent—but that a lessee must take into account the liability of coal mines to be disturbed by faults (*x*).

In a case where the covenants in a lease were very ambiguous, and there was no express obligation on the lessees to work the mines at all, it was held, that the lessees could not be compelled to sink a pit for that purpose, even though it was doubtful whether any other mode, by way of outstroke, was authorized (*y*).

A lessee covenanted to pay a certain proportion of the value of nine hundred weight of the coals to be raised, unless prevented by unavoidable accident from working the pit. It was held, that if the accident were only of such a nature that the working of the pit was not physically

(*v*) Jones *v.* Shears, 7 Car. & P. 346, per Coleridge, J. See Binney *v.* The Ince Hall Coal and Cannel Company, 35 L. J., Ch. 363.

(*w*) Griffiths *v.* Rigby, 1 Hurl. & N. 237; 25 L. J., Exch. 284.

(*x*) Ridgway *v.* Sneyd, Kay, 627.

(*y*) James *v.* Cochrane, 8 Exch. 556; 21 L. J., N. S., Exch. 229.

impossible, but might have been effected, the defendant was liable, though the expense would be greater than the value of the coals to be raised (*z*).

In this case, the defendant had demised coal mines at specified rents for certain quantities, and the lessee covenanted to work 900 weys yearly, subject to a proviso that if there should not be found a sufficient quantity of coal to work 900 weys a year, or if the lessee during the term should have worked all the coal, the lessee should be discharged from the covenant. The lessee worked the coal till the faults and dislocations rendered the working more expensive than was conceived at the time of taking the lease, so as greatly to exceed the value at which the coals could be sold, by which they sustained a loss of 2*l.* a day. The colliery was then stopped. The defendant twice recovered damages at law for nonpayment of rents, and had brought two other actions of the same kind. The lessees then filed a bill praying an account of the quantity of coals capable of being raised, and, in case it should appear that the defendant had received a sum equal to the rent payable under the lease, or if it should appear he had not been fully paid, then, upon payment of so much as was unpaid, he should be restrained from bringing actions for rent. It was held by Lord Kenyon, M. R., that a Court of Equity must forget its name if it did not interfere. If any disadvantage could arise to the lessor, the Court would not interfere. If parties enter into legal contracts, they are bound to fulfil them. But if they enter into contracts which are enforced for the purpose of harassment or vexation, Courts of Equity properly interfere. If this contract was carried on, the lessee must pursue the object at a greater expense than he can gain by it, the property being either not attainable, or only at an intolerable expense. The offer to pay the lessor all he could ever obtain with incurring the expense, offered

(*z*) Morris *v.* Smith, 3 Doug 279.

every thing he could fairly require. He would be paid for the coals, though they would be left on the estate. It was referred to the master to ascertain what quantity of coals remained to be got on the terms of the lease. It was also ordered, that the plaintiff should pay into the bank the full yearly sum payable under the lease, subject to the further order of the Court, and that, if the defendant would accept a surrender of the lease, the master should inquire what would be a full satisfaction of the covenants (*a*).

In a later case, there was a demise of all mines of coal and ironstone which had then been or should, during the demise, *be discovered* under certain lands, at a yearly rent, payable whether the mines were worked or not, and at tonnage rents. The lessee covenanted to work the mines in a proper manner. It was held, that, in order to show any breach of covenant in not working, it was necessary that the mines should have been discovered or opened (*b*).

In another case, a coal mine was let for twenty-one years at a certain rent payable whether the mine was worked or not, and at additional rents for every wey beyond a stipulated number. The lessee worked the mine for some years, and then discovered that in consequence of unforeseen natural defects, and of accidents in working, it could not be further worked by him except at a ruinous cost. The clause of abandonment was confined to complete exhaustion, and the lessee covenanted to work the mine. It was held, that the lessee could not be relieved from the certain rent payable under the lease, as it had been agreed that that rent should be paid in all events (*c*).

A lessee of a coal mine underlet it to the defendants, who were to pay for every ton of coal worked in each year, not exceeding 13,000 tons in any one year, the sum of 8*d*., or the same amount in money, namely 433*l*. 6*s*. 8*d*.

(*a*) Smith *v*. Morris, 2 Bro. C. C. 311.

(*b*) Quarrington *v*. Arthur, 10 M. & W. 335; 11 L. J., N. S., Exch. 418.

(*c*) Phillips *v*. Jones, 9 Sim. 519.

as fixed rent, whether the coals should be worked or not, and the sum of 9*d.* for every ton above that quantity. The defendants covenanted to work 13,000 tons in each year, and pay the rents as above stated. On an action being brought for rent, it was contended, on the part of the defendants, that the mine became exhausted during the first year, and that the existence of coals was a condition precedent to the payment of rent. But it was held, that no such condition could be implied, and that the defendants were liable to the consequences of their contract (*d*).

A lease reserved certain rents for every acre of two beds of coal, and also stipulated that the lessee should every year work not less than two acres of two beds of coal, or would pay for that quantity at that rate every year, *whether the same could be got or not.* The lessee filed a bill for cancelling the lease, on the ground that the coal in one bed could not be freed from water so as to be worked—that this fact could not be known before the lease was granted—that the other bed was so broken by faults as to render it impossible to procure the stipulated quantity. But it was held, that such a mistake on the part of the lessee was not relievable—that every mining lease was granted in ignorance of what might be got—that the parties make terms accordingly—and that the lessee was bound to pay the rents (*e*).

In another case, the plaintiff had granted to the defendant certain coal mines, and the latter covenanted to pay as the price of the coal the sum of 40*l.* for every acre of the coal which should be *found*, and till the price was fully paid, to pay 40*l.* in each year whether the whole of an acre in any such year should be gotten or not. It was held by the Court of Exchequer, that the finding of the coals was a condition precedent to the obligation to pay in either case. But this decision was reversed in the Ex-

(*d*) Marquis of Bute *v.* Thompson, 13 M. & W. 487; 14 L. J., N. S., Exch. 95.

(*e*) Mellers *v.* Duke of Devonshire, 16 Beav. 252; 22 L. J., N. S., C. C. 310.

chequer Chamber. Lord Denman, in giving the judgment of the Court, said, that the indenture operated as an absolute sale and conveyance of the coal, but without any covenant on the part of the defendant to work it, and that the word "found" meant "ascertained to lie and be." It was necessary to ascertain this quantity, to fix the amount of purchase-money, which could be done without getting the coal. The defendant was the proper person to find the quantity, and to secure this the covenant to pay 40*l.* a year was inserted. The right of the plaintiff to sue for this sum was absolute and without condition, and it was for the defendant to show that he had ascertained the quantity of coal, and had fully paid the price (*f*).

An agreement for the demise of a mine of rock salt, for twenty-one years, contained stipulations on the part of the intended lessee to raise a certain quantity of tons, or to pay for it, and also with reasonable diligence to sink a shaft, and to work the mine to a certain depth. A lease was to be executed before a certain day. There was also a proviso, that in case the rock salt should fail by any inevitable accident, then, on payment of the rents, and on performance of the covenants by the lessees, the term should cease. At the time of the agreement the lessees had begun to sink the shaft, and, soon afterwards, the mine was flooded, and they could not reasonably continue to work it. They gave notice of this fact to the lessor, who required them to execute a lease according to the terms of the agreement. This lease followed the language of the agreement, and was executed by the lessees. If it had been executed at the proper time, the accident would then have been prospective. No work was done after its execution. In an action to recover the rents, it was held, that the covenants of the lease were absolute and unqualified—that the "inevitable accident" must be considered

(*f*) Jowett *v.* Spencer, 1 Exch. 647; 15 L. J., N. S., Exch. 347; 17 L. J., N. S., Exch. 367.

as contemplated after the execution of the lease—that the mine had not been worked according to the lease—and that, if the lease did not express what the parties intended, the remedy was in a court of equity for a reform of the lease (*g*).

In an agreement for a lease, no certain rent was reserved, and the intended lessor was only entitled to a tonnage rent in the quantity raised. It was held, that the tenant was bound to begin working immediately, and to proceed without intermission (*h*).

Questions of due performance are, of course, properly for the consideration of a jury; but if there be any fraudulent delay on the part of the lessee, the Court of Chancery will interfere and order him to pay the rent which would have accrued, if the mine had been properly worked.

A rent of 600*l.* was reserved in a lease of coal mines, the first quarter's payment of which was to be made at the next feast after the lessee should have worked one thousand stacks of coal. There was a covenant by the lessor that he would dig the thousand stacks of coal without delay, and in a reasonable time, and that he would dig the pits in a workmanlike manner, and level the pits with the gin pit, viz., the pit where the engine is to carry away the water. There was a mutual covenant that the lessee might, on giving six months' notice, determine the lease, on payment of all the rents due and performance of the covenants. The lessor entered, and afterwards gave six months' notice, by which he insisted that the lease was determined at Christmas, 1723. The lessor filed a bill in Chancery, alleging that the defendant, after having entered, had worked before the first quarter day the thousand stacks of coals, except a small quantity, and had employed his workmen in other works, telling some of them that he

(*g*) Jervis *v.* Tomkinson, 1 Hurl. & N. 195; 26 L. J., Exch. 41.

(*h*) Sharp *v.* Wright, 28 Beav. 150.

was not such a fool as to pay a quarter's rent for a few days' work, and insisted that the first quarter's rent ought to have been paid at Lady-day, 1721. The bill prayed a specific performance of the covenants, and that the lease might continue for twenty-one years, because the power to determine by notice was conditional, viz., on paying the rent and performing the covenants, which he had not done; for the pits were not levelled with the gin pit, and were overflowed with water, and rendered of no service to the lessor. It was contended for the lessee, first, that the bill ought to be dismissed, because the plaintiff, if injured, might have his remedy at law; and, secondly, that it was a question for the consideration of a jury whether the lessee had performed his covenants. Lord Chancellor King agreed with the counsel on the second point; for if the defendant had not performed his covenants, he could not then determine the lease, and if that was still subsisting, which was a fact for a jury to try, an action laid for the rent. But as to the first point, though the plaintiff might indeed have remedy by an action of covenant, upon the collateral covenant to dig the coal without delay, yet there was fraud in preventing the digging before the quarter day, in order that the rent might not commence so soon, and this fraud required the interposition of the Court. It was, therefore, decreed that the defendant should pay the first quarter's rent due at Lady-day, 1721, and account and pay the rent to Christmas, 1723, till which time the defendant allowed the lease to be subsisting, but that the bill should be dismissed as to the second point, whether the lease was determined or not. The costs were to depend on the issue of the suit (*i*).

In mining leases, containing the usual reservations of certain rents and tonnage rents, and a power at any time to determine the lease, on giving six months' notice, the

(*i*) Greene *v.* Sparrow, Reg. Lib. A., 1725, fols. 120, 124, cited 3 Swanst. 408.

lessee is not a tenant from year to year, but for the term granted—and he may determine the lease without reference to the commencement of his tenancy (*i*).

In a lease of mines and smelting mills in a waste there was the recital of an agreement that the lessees should take down a smelting mill, and erect a mill of larger dimensions, with several other buildings upon another piece of ground in the same waste, which were thenceforth to become the property of the lessor and the two other proprietors of the mines of the waste. There was a covenant on the part of the lessees to keep and deliver up at the end of the term in good repair the new mill to be erected. The lessor was not entitled to the general property in the waste, but he had power to erect buildings and smelting mills. It was held, that, though the covenant did not expressly extend to the erection of the new mill, there was an implied covenant to fulfil the terms of the agreement. It was also decided, that the covenant ran with the land, that is, the mines demised, so as to be available to the assignee of the reversion. The covenant was considered to tend to the support and maintenance of the subject of demise (*j*).

In another case, the owners of several distinct iron works joined with other persons in forming a railway, and severally engaged that they and their assigns would take all the limestone used in their works from a certain quarry, and carry it, and the ironstone from their mines to their furnaces along the railway, on payment of a certain tonnage. The partnership deed of the railway recited that the strangers joined in the scheme in consideration of those benefits. The owners of one of the iron works sold them

(*i*) Bridges *v.* Potts, 17 C. B. (N. S.) 314; 33 L. J., C. P. 338.

(*j*) Sampson *v.* Easterby, 9 Barn. & C. 505; 1 Cromp. & Jer. 105.

to a purchaser with notice of the covenant. It was held, that he was not bound by the covenant, on the ground that the covenant was entered into by mere strangers, that there was a want of privity, and that parties could not be allowed to invent new modes for the enjoyment of property to be transmitted to remote persons, and impressed with peculiar conditions. It was creating a new species of tenure (*k*). The latter reasons for this decision have not been acquiesced in, and they seem to be quite open to dispute. The case must rest upon the want of privity (*l*).

In an agreement for a lease of land for a railway, it was covenanted that the lessees and their assigns should carry all the coals from a certain colliery, and all the coal from any other mines to be worked by them in a certain township, at a rate or rent of 2*d*. per ton. Subsequent assignees of the railway and the mines refused to pay the rent for any other coal than that from the specified colliery, and used another railway for the other coal. It was held, that the covenant ran with the land, and that the assignees were bound to pay all the rates (*m*).

It was stipulated in a lease of land and of quarries, that the lessee should not commit waste by cutting trees, which were also excepted. It was held, that the lessee was justified in cutting down trees which were interfered with by the proper working of the quarries (*n*).

A lease of coal and iron mines had been made by several tenants in common, both legal and equitable. The lessees entered into usual covenants with all the lessors, and each and every of them, their and each and every of their heirs, executors, administrators and assigns. The plaintiff, who had acquired a legal title to a moiety of the mines, brought an action for breach of covenant. It was held, that the covenants were all of a joint nature, as affecting the

(*k*) Keppell *v.* Bailey, 2 Myl. & Keen, 517.

(*l*) 2 Sug. Ven. and Purch. 502.

(*m*) Hemmingway *v.* Fernandez, 12 L. J., N. S., C. C. 130.

(*n*) Doe *d.* Rogers *v.* Price, 8 Com. B. 894; 19 L. J., N. S., C. P. 121.

quality of the subject of demise, or the mode of enjoying it, and that all the covenantees in their lives, and after the death of any of them the survivors, were the proper plaintiffs. It was stated to be unnecessary to inquire, whether one of several tenants in common, lessors, could sue on a covenant with all to repair, as to which there was no decisive authority either way. It was also admitted, that, if the language of a covenant was capable of being so construed, it was to be taken to be joint or several, according to the interests of the parties to it; but that, when the interest is joint, the same covenant cannot be made joint and several by any words, however strong (*o*).

It is not necessary, when there is a joint and several covenant at the beginning of a long course of covenants, with proper introductory words, that the joint and several liability should be expressed with respect to every distinct matter (*p*).

In a case, where the covenantees, the purchasers of certain collieries, were not copartners, but only contemplated partnership, and covenants were entered into severally by the vendors, it was held that the subject-matter of the covenants was a several interest; for each purchaser had a separate right in respect of his share (*q*).

It was covenanted in a very special agreement under seal, dated the 21st of July, 1849, that the defendants should grant a lease for twelve years, from the 25th of March last past, of a plot of land on which the plaintiff had erected a factory for making patent fuel; that all the coals used by the plaintiff during the term for the purpose of his manufacture should be purchased from the defendants, if they could sufficiently supply him, or to such extent as they could supply, at certain rates, and of suitable

(*o*) Bradburne *v.* Botfield, 14 M. & W. 559; 14 L. J., N. S., Exch. 330.

(*p*) Duke of Northumberland *v.* Errington, 5 T. R. 522.

(*q*) Mills *v.* Ladbroke, 13 L. J., N. S., C. P. 122. See Sorsbie *v.* Park, Ibid., Exch. 9; 12 M. & W. 146.

quality for making steam fuel; that the defendants should not be compelled to supply more than 500 tons per week, and, if from some substantial cause they should be unable to supply that quantity, they should give to the plaintiff six months' notice of their inability, and the plaintiff should be at liberty to get his supply or the excess elsewhere. There were several other covenants, as, that the plaintiff should not use the land for any other purpose but for making patent fuel, and that the agreement, determinable as before mentioned, should continue for the term of twelve years *from the date.* It was held, that the granting of the lease was not a condition precedent to supplying the coal, and that the two covenants were independent; that the term of twelve years in the former part of the agreement did not refer to the other term of twelve years for which the lease was to be granted; that the inability to supply coal from a substantial cause did not excuse the want of supply, unless the six months' notice was given; and that the agreement was confined to coals required for patent fuel (*r*).

In the same case it had also been previously decided, that the intention of the defendants to supply the coal was sufficiently apparent, and amounted to a sufficient covenant for that purpose, although there was no express covenant to that effect (*s*).

In another case, a lessee of iron mines and works covenanted to carry on the furnaces and works effectually, except for the time required for repairs, or in the event of any unavoidable accident, or the want of supply of necessary materials, or in case the ironstone to be got or raised by the lessee out of the demised mines should be insufficient in quantity to supply the furnaces or works, or would not by itself, or with a proper mixture and process in the

(*r*) Wood *v.* Copper Miners' Company, 14 C. B. 428; 23 L. J., N. S., C. P. 209.

(*s*) Ibid., 7 Com. B. 906; 18 L. J., N. S., C. P. 293.

smelting or manufacturing, make good common pig-iron. It was held, that it was not necessary that the proper mixture should be found upon the lands demised, but was to be procured by the lessees as some of the articles to be used in their trade as manufacturers of iron, in accordance with the actual practice of the lessees under the covenants (*t*).

In the above case, there was also a covenant to yield up in repair the furnaces, fire engine, iron works, and buildings, except the iron-work castings, railways, machines, and the moveable implements and materials. It was held, that the lessees had a right to remove whatever was in the nature of a machine, or part of a machine, as iron work or iron casting, or railways or moveable implements or materials, but not anything in the nature of buildings or support of buildings, although made of iron; that they were not bound to restore the brickwork in a perfect state, as if the article intended to be covered or protected were there, but to exercise the right of removal, so as to leave the brickwork in the state most useful to the lessor.

In another case, it was covenanted, that if the lessor should, *at any time* before the determination of the lease, give notice in writing to the lessee, of his desire to take all or any part of the machinery, stock in trade, &c., in or about the mines, then the lessee would, at the expiration of the lease, deliver the articles specified in the notice to the lessor, on payment of the value to be ascertained by reference. It was held that the covenant was so injurious and oppressive to the lessee, that a Court of Equity ought not to enforce it, or to grant an injunction for preventing a breach of it (*u*).

A lessor had demised a colliery, and all the engines, machinery, and other effects belonging to it. There was a proviso for re-entry on nonpayment of rent, and another proviso, that on the determination of the lease, the lessee

(*t*) Foley *v.* Addenbrooke, 13 M. & W. 174; 14 L. J., N. S., Ex. 169.

(*u*) Talbot *v.* Ford, 13 Sim. 173.

should yield up to the lessor all the engines and other effects, according to an inventory and valuation to be made three months previously, as compared with an existing inventory and valuation, and that the difference in value should be adjusted between them. The tenant failed in paying the rent, and the lessor recovered in ejectment, but did not execute his writ of possession for more than a year. On the day after possession was taken, the tenant committed an act of bankruptcy. No inventory or valuation was made. It was held, that, as the lease had been forfeited by the act of the tenant, the lessor was entitled, without valuation, to resume possession of the whole property, including even the new machinery erected by the tenant. It was also held, that the tenant never had possession of the articles within the meaning of the bankrupt law, and that if he had, it would have ceased on the landlord resuming possession (*v*).

The lessee of a mine covenanted to leave for the lessor, at the end of the term, if required, all the engines and materials which should have been used, on receiving usual notice, and on being paid according to valuation. In a subsequent part of the lease, the lessee was empowered at any time *during the term*, or within twelve months after its expiration, to remove all the machinery, engines and materials which should be erected or brought by him on the premises, unless the lessor wished to purchase the same, and give notice and make payment as before mentioned. The lessee also covenanted not to do any act which might occasion the drowning of the mine. Many years before the expiration of the term the lessee became insolvent, and assigned all he had brought on the premises to trustees, who gave notice to the lessor of their intention to remove them, unless he purchased. The lessor filed a bill, alleging that the removal would effect the drowning of the mine, and praying for an injunction till the end of the term.

(*v*) Storer *v.* Hunter, 3 B. & C. 368.

But the Court allowed a demurrer, on the ground, that the lessee, according to the true construction of the lease, had power to reserve the property he had brought, unless the lessor exercised this right of purchase (*w*).

If a contract, originally well defined, becomes, by the act of a complainant, so much mixed up with other matters, as to be incapable of accurate separation, he will lose the whole benefit of the contract. Thus, a coal owner agreed to find sufficient coal for the engine of another owner, for drawing water from the coal mines of both owners, *as they then stood.* The latter owner sunk to a lower seam, and in draining it he consumed for his engine much more coal. It was held, that the first owner was no longer bound to furnish any coal, because the measure of sufficiency had been destroyed (*x*).

In a lease of alum mines, the lessee had the right to take alum from coal wastes. In a subsequent lease of the coal mines, it was provided, that the grant should not injure the rights of the alum lessees. The coal could not be thoroughly worked without removing the pillars that supported the roof; but the alum in the wastes would be thereby rendered inaccessible. It was held, that the coal pillars could not be removed (*y*).

In a case, which was sent by the Lord Chancellor for the opinion of the Court of King's Bench, it appeared the defendant had conveyed to the plaintiff, in fee, several closes of land, with a reservation of the mines of coal, and liberty to enter and dig so many and such pits as should be proper for getting all such coal, and to erect engines, and make ditches and drains, for working the coal, "*except* as to such lands as lie within one hundred and fifty yards of the messuage and building, and *except* any homestead." The plaintiff took possession, and the defendant began to sink

(*w*) Rolleston *v.* New, 4 Kay & J. 640.

(*x*) Pringle *v.* Taylor, 2 Taunt. 150.

(*y*) Earl of Glasgow *v.* Hurlet and Campsie Alum Company, 3 H. of L. Cas. 25.

pits, and erect engines and works for taking the coal, part of which works were within the distance of one hundred and fifty yards from the buildings, and considerably within the distance of one hundred and fifty yards from the ground called the homestead, on which the buildings stood; and he proceeded to work the coal from under the homestead, and the lands lying within one hundred and fifty yards from the homestead and buildings. The defendant was restrained by injunction from further operations till further order. The Court of King's Bench was of opinion, that the defendant had reserved to himself the right, and was then entitled to dig coals from and under the messuage, buildings, and homestead, and within one hundred and fifty yards from them; but that he had not reserved to himself, and was not entitled, to sink pits or shafts, or erect engines or make ditches and drains, for working the coal, within one hundred and fifty yards of the messuage and buildings, or within the homestead; but that he was not restricted, with respect to the homestead, further than the homestead itself (*z*).

In another case, the defendant, in reply to an action of trespass, pleaded an immemorial custom to search for minerals in a certain district, except in the sites of houses, *gardens*, orchards, and highways. It was proved, that the place in question had been planted with shrubs within the last six years, and with potatoes just before the commission of the trespass. It was decided, that the place was a garden within the meaning of the exception (*a*).

It is a well-known rule that parol evidence may be given to explain the meaning of technical expressions in an instrument. An expression may be perfectly intelligible in itself, in its ordinary sense, but it may be shown that it was used in a different sense. Thus, a lessee of a coal mine

(*z*) Bowler *v.* Wolley, 15 East, 444.

(*a*) Gilbert *v.* Tomison, 4 Dowl. & R. 222.

covenanted to get the whole of the mines, "not deeper than or below the level of the bottom of the said mine," under a particular part or point. It was held, that parol evidence was admissible to show that the word "level" had a particular meaning among miners different from the meaning of "horizontal line." The term "level" had reference to the drainage and the inclination of the strata; and every part of the mine which would require to be drained from a point lower than the bottom of the mine under the given point was below the *level* of the bottom there, though it might be above the horizontal plane passing through that part of the bottom. This case was then referred by consent to an arbitrator, to state the meaning of the covenant, "according to the custom and understanding of miners." He found that the mine was situate within an extensive coal-mining district in Lancashire, and declared the custom *throughout that district.* Some of the parties to the lease were described in it as residing without the district. It was held, that it could not be concluded that the parties used the term with reference to the custom, but that the custom was only evidence for a jury to draw the conclusion. If the arbitrator had found the custom generally, such a conclusion might have been drawn by the Court. A new trial was granted, but the case was compromised (*b*).

In a case in the Forest of Dean, where the award of the Commissioners for regulating the working of mines there had defined the southern boundary of the colliery "as commencing at the points where the *said level* struck the coal, and extending in an eastward direction *as deep as the said level will drain.*" The dip of the coal was to the south. The boundaries were sufficiently complete, with the aid of an old level which had been driven to drain a colliery. But it was contended, that the workings had

(*b*) Clayton *v.* Gregson, 5 Ad. & E. 302; Smith *v.* Wilson, 3 Barn. & Ad. 728. See Att.-Gen. *v.* Shore, 9 Cl. & Fin. 499, per Tindal, C. J., and Parke, B.

fallen in so as to debar all examination by the commissioners, and that the colliery itself was often called a "level" by the miners there, and even in the award itself, and that the word must mean a horizontal line drawn from the point where the old adit or level struck the coal. It was held, that an existing level was meant, and that the level of the colliery that was stated to have struck the coal was made the measure of the southward workings (*c*).

A mining term may also be explained in accordance with the rule relating to mercantile contracts (*d*); and in like manner it is presumed there may in some cases be extrinsic evidence for supplying omissions in mining agreements (*e*). But a general dictionary is not sufficient evidence of meaning derived from local usage (*f*).

In a lease of clay, pit-pans and levels were held to be "works" within the meaning of a covenant (*g*).

A lessee covenanted to pay a certain yearly rent, and a further sum for every score of baskets of coal worked, and also one-half of all such sums as the coal should sell for at the pit mouth above 4*d*. the basket. It was held, that the covenant was not ambiguous, and that the latter part did not extend to coals sold elsewhere than at the pit's mouth. Lord Kenyon, C. J., said, that the conduct of the defendants might possibly be a fraud on the covenant, and a Court of Equity might perhaps give relief, but a Court of Law could not get rid of the covenant (*h*). Another action was brought in the Court of Common Pleas, where it was decided that the covenant was not

(*c*) Brain *v.* Harris, 24 L. J., N. S., Exch. 177. See Morgan *v.* Edwards, 6 Taunt. 695.

(*d*) See Hutchison *v.* Bowker, 5 M. & W. 535.

(*e*) Hutton *v.* Warren, 1 M. & W. 474; Wigglesworth *v.* Dallison, 1 Doug. 201.

(*f*) Houghton *v.* Gilbart, 7 C. & P. 701.

(*g*) Martyn *v.* Williams, 1 Hurl. & N. 817; 26 L. J., Exch. 117.

(*h*) Clifton *v.* Walmesley, 5 T. R. 564.

limited to the pit mouth (*i*). But the decision was reversed in the Court of Error (*j*).

Another mining lease contained a covenant that the lessees should deliver quarterly to the lessor two-thirteenths of all coal to be raised, or should pay him the value in money; provided, that if at the end of the first quarter of any year such deliveries or payments should not have equalled in value or amount the sum of 38*l.* 10*s.*, the lessees should also then pay such additional rent or sum as would make up that sum; and if at the end of the second quarter such deliveries or payments for that and the preceding quarter should not have equalled the sum of 75*l.*, the lessees should then pay the deficiency. Similar provision was made for the third and fourth quarters, with a declaration that the royalties should always amount to the yearly sum of 150*l.* *at the least.* It was held, that in calculating the amount due at the end of the year, the excess of royalty above 38*l.* 10*s.* in one quarter should not be set against the deficiency of a previous quarter, but that the rent was to be completed every quarter (*k*).

In a demise of limestone quarries and limekilns, it was covenanted by the lessee, that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a certain price, for the improvement of their lands, and the repair of their houses. It was held, that this amounted to a covenant to burn lime at such seasons, and that the lessee could not plead that no lime was burnt on the premises, out of which the lessor could be supplied (*l*).

In another case, land was demised to the plaintiff at an annual rent for a term of years, with liberty to dig half an acre of brick earth every year. The lessee covenanted not

(*i*) 1 Bos. & P. 524.

(*j*) Gerrard *v.* Clifton, 7 T. R. 676.

(*k*) Bishop *v.* Goodwin, 14 M. & W. 260; 14 L. J., N. S., Exch. 290. See Buckley *v.* Kenyon, 10 East, 139.

(*l*) Shrewsbury (Earl) *v.* Gould, 2 B. & Ald. 487.

to dig more, or, if he did, that he would pay a double rent. On the brick earth being dug by a stranger, the lessee recovered against him the full value of the part taken away. It was held, that he was entitled, as against the lessor, to retain the whole amount for himself (*m*).

Another lessee covenanted to pay one-third of the money that should be made, received or produced from the sale of coals, and to keep true accounts of all the coals to be raised. It was held, on the two covenants, that the rent was to be estimated on the amount of coal sold, and not on the amount of money received (*n*).

In the case of an assignment of a lease of coal mines, it was covenanted by the assignee that, as long as he should be in possession, he would pay the rents and other sums payable under the lease, and perform and observe the other conditions and terms of the lease, and keep indemnified the assignor against all actions, costs and claims relating thereto. It was held, that the assignee was liable in respect of the indemnity, without reference to the period of possession (*o*).

A covenant to repair is assignable with the reversion. But a claim to damages for injury to lands does not pass with the conveyance of the land (*p*).

When a lessor enters into the usual covenant for quiet enjoyment by his lessee, it is immaterial whether the breach of covenant arises from a wrongful, or a rightful act. A lessor had demised coal with a covenant of this kind, and had then worked a bed of ironstone lying above the coal. Although the ironstone was got in a workman-like manner, the roof of the coal mine was crushed in, and the mine was flooded. It was held, that the covenant was broken,

(*m*) Attersoll *v.* Stevens, 1 Taunt. 183.

(*n*) Edwards *v.* Rees, 7 Car. & P. 340. See Coker *v.* Guy, 2 B. & P. 565; Buckley *v.* Kenyon, 10 East, 139.

(*o*) Crossfield *v.* Morrison, 7 Com. B. 286; 18 L. J., N. S., C. P. 135.

(*p*) Martyn *v.* Williams, supra.

and an injunction was granted for restraining the lessor from working the ironstone within a certain distance (*q*).

In another case, mines were demised for ninety-nine years, with the lands in which they were situate; and it was stipulated that a sum of 16,000*l.* should be paid to the lessors in twelve years by instalments, and that on non-payment they might re-enter and distrain. Additional rents were also reserved for minerals worked above a certain quantity. There was also a covenant to pay a yearly sum of 110*l.* during the tenancy and till the lands were restored to their original state, with a power of distress. On a bill being filed to declare the rights of the parties, it was held, that the instalments were not rents, but purchase sums, and in the nature of a personal debt (*r*).

In a lease of lands and mines for thirty years, an annual surface rent was reserved, and the rent for the mines, which was payable to the heirs and assigns of the lessor, and which was called "further consideration money," consisted of a yearly certain sum for the first ten years, estimated for one acre of coal worked, with special stipulations for an increase of the yearly certain sum in respect of the additional acres worked, and for the possible cesser of the yearly sums reserved for the first ten years. The lessor died intestate, and a contest arose between the heir and the next of kin, whether the "further consideration money" was to be treated as rent, or as arising from a sale of the minerals. It was held, that it passed to the heir as rent (*s*).

A lease of quarries was held by a company at certain rents, and without any stipulation against assignment. The company was unsuccessful, and was wound up on the petition of a shareholder. The lease was assigned to a purchaser. The lessor claimed to have impounded out of

(*q*) Shaw *v.* Stenton, 2 Hurl. & N. 858; 27 L. J., Exch. 253.

(*r*) Hatherton *v.* Bradbourne, 13 Sim. 599; 13 L. J., N. S., C. C. 171.

(*s*) Barrs *v.* Lea, 33 L. J., Ch. 437.

the assets of the company a sum sufficient to meet any possible deficiency in the future payments of the rent, or that the winding up should be stayed while the lease lasted. The claim was rejected in the Rolls Court. But on appeal, a claim was directed to be entered for the whole amount of the future rent during the term (*t*).

By 22 & 23 Vict. c. 35, s. 1, a licence dispensing with a forfeiture or right of re-entry, under a condition or power in any lease, shall only extend to the particular act authorized, unless otherwise expressed, and shall not affect any subsequent breach. In like manner, by 23 & 24 Vict. c. 28, s. 6, the waiver of any covenant or condition in any lease by the lessor is confined to the particular instance proved to have occurred.

Income tax is payable, under 5 & 6 Vict. c. 35, in respect of all royalties, as *rents*—including royalties paid for brickfields (*u*).

Section III.

SPECIFIC PERFORMANCE AND EQUITABLE RELIEF.

A Court of Equity will not only carry into execution contracts for leases and covenants in actual leases by a decree of specific performance, but it will generally relieve grantees from fraudulent, unjust and unexpected engagements, in whatever form these have been contracted.

While a suit for specific performance for a demise of quarries was pending, one of the defendants had taken

(*t*) In re The Hayter Granite Company, Ex parte Bell, 35 L. J., Ch. 29, 154; 1 L. Rep., Eq. 11.

(*u*) Edmonds *v.* Eastwood, 27 L. J., Exch. 209; 2 Hurl. & N. 811.

away a quantity of the stone. It had been declared that the plaintiff was entitled to performance, but at that time this fact was not known. A supplemental bill was filed by the plaintiff for obtaining compensation, which was resisted on the ground that it might have been had at law. But Lord Langdale held, that it was not necessary to resort to that circuitous mode of relief. He thought the amount ought to be ascertained by an action at law. In that, and perhaps in all cases, the profit made by the defendants was not the measure of the damages done to the plaintiff, for the quarry was not worked in a way to make the most of it. This was a case of damages and not of account, because it was to recover something which could not be ascertained by taking an account of the profits made: it was to ascertain the amount of the loss which the plaintiff had sustained by being prevented from doing that which he was entitled to do. The proper mode of assessing the amount of the damage was to require the defendants to admit such facts as were necessary, and to allow the plaintiff to bring an action to ascertain *quantum damnificatus* (*x*). This mode of procedure is now altered by the Chancery Amendment Act, 1858 (*y*).

But a specific performance of a contract will not be decreed, if the claimant cannot have it as it existed at the time of contract.

Thus, a contract was made for a lease of mines, in which one-fifteenth of the produce was to be rendered. The agreement was made by the owner of a term of years granted by a tenant for life on behalf of himself and the latter owner. The mines afterwards became very valuable, and the owner of the term attempted by an assignment of the term to give another lease to other lessees at the same rent. An Act of Parliament was afterwards got, empowering the person in possession of the land to grant a lease of the minerals at the best rent, and a lease under the

(*x*) Nelson *v.* Bridges, 2 Beav. 239.

(*y*) See Chap. XI. and XIII.

power was granted, *at the same rent*, to the second lessees. On a bill being filed by the first lessees to set aside this lease, and to establish their own lease under the act, it was held, that as the rent was less than the value, the lease last granted under the act was void, but that there was no power to enforce the first contract, which was equally unauthorized by the act. The bill did not pray for the contract to be carried out *pro tanto*, without reference to the act, nor for a new lease at an improved rent. It was admitted, that when a party entered into a contract without having the power of performance, and afterwards acquired the right which he agreed to dispose of, he was then bound to perform it (*z*).

A Court of Equity will not decree specific performance of a contract which is ambiguous in its terms, and which cannot be made clear by proper proofs. For the Court cannot make a new agreement. Like invalid parol agreements, imperfect written contracts cannot be completed by any part performance of the parties. Thus, if a lease or a contract for a lease has not sufficiently defined the rents to be payable in all events, or the duration of time for which the grant is to exist, or is repugnant, or is deficient in any matters which ought to have been fully and finally settled by the parties, they will be left to their remedy at law (*a*). This remedy may, in many cases, be equally unavailing, if a Court of Law also fails to extract an intelligible contract from the materials before it. But it will support an action for use and occupation if there has been possession (*b*). If the instrument is deficient in defining the parcels or subject matter, this defect may be supplied in either Court by parol proof, or by possession (*c*).

(*z*) Carne *v.* Mitchell, 15 L. J., N. S., C. C. 287.

(*a*) Meynell *v.* Surtees, 3 Sm. & G. 101; 25 L. J., C. C. 257. See also Walters *v.* The Northern Coal Mining Comp., 25 L. J., Chanc. 633.

(*b*) Jones *v.* Reynolds, 4 Ad. & Ell. 808.

(*c*) Doe *d.* Templeman *v.* Martin, 4 Barn. & Ad. 785.

But a Court of Equity will not refuse to admit new or supplementary terms for the completion of contracts, if they have been omitted by fraud or by mistake, or if they are confessed by the answers of the defendants. It does not, however, seem to be very clear whether, in ordinary cases of omission or mistake, the Court would admit parol evidence alone to amend or perfect the contract, or would simply refuse specific performance (*d*).

In a case where lands, containing coal mines, belonged to two tenants in common, one of them had agreed, by letter, to give a lease of all the coal upon certain terms contained in an agreement, which was stated to be in the custody of a solicitor. Two documents were with the solicitor—and both contained specific terms for letting the coal, in which the same lessee was proposed, but without amounting to any positive agreement. In one of the documents, marked A, "*coals, &c.,*" were proposed to be demised. It was held, that the two documents together did not comprise a perfect agreement capable of being carried out by a decree for specific performance; and, if one document only was to be taken, that it was not sufficiently certain which was the one referred to in the letter; that if the one marked A was to be taken, it was too ambiguous in its terms to be carried into effect, and that there was no evidence to show what was intended to pass under the expression *coals, &c.* It was also held, that as the bill had been dismissed against the other tenant in common, and as the owner proposing to contract never meant to demise one moiety only, the Court would not act against him in respect of his share only. Knight Bruce, L. J., remarked, there were cases where a person, who had contracted to convey more than he could convey,

(*d*) Joynes *v.* Statham, 3 Atk. 388; Marquis of Townshend *v.* Stangroom, 6 Ves. 328; Ramsbottom *v.* Gosden, 1 Ves. & B. 165; Woolam *v.* Hearn, 7 Ves. 211; Att.-Gen. *v.* Sitwell, 1 You. & C. 559. See Story on Equity Jur. vol. i. pp. 152—161; Jones *v.* Reynolds, 1 Q. B. 506; 10 L. J., N. S., Q. B. 193; Ricketts *v.* Bell, 1 De G. & S. 335.

ought to be decreed to convey what he could, either with or without making compensation to the vendee for such part as the vendor could not convey; but that a lease of an undivided moiety of a colliery was very different from a lease of a whole colliery, and there was no misrepresentation as to the capability of contracting for the whole, or on any other ground (*e*).

In a suit for specific performance, the plaintiff had offered, by letter, to become the lessee of ironstone mines, specifying the terms, and also offering references as to his fitness, jointly with another respectable party, for the undertaking; but the mineral area was not defined. The offer was accepted, and the plaintiff entered and worked the mines by way of trial, pursuant to arrangement. He then applied for a lease, which was refused on the ground, that the plaintiff declined to give security that the covenants of the lease would be observed, or to join with any responsible person in the enterprise. It was held, that the landlord was not bound to define the area, and that specific performance could not be decreed (*f*).

In the above case, the trial was not subject to any fixed rent, but only to tonnage rents, with power to abandon, and the plaintiff claimed compensation under 21 & 22 Vict. c. 27. But it was refused.

In another case, two agreements had been made by landowners to two different mine owners for the demise of coal. The agreements were very similar, and the area was in each case described with reference to a fault, which was *supposed* to run in a direction laid down in a plan. It was stated that the exact quantity could not be ascertained, but in one case it was supposed to be eighty-three acres or thereabouts, and in the other case ninety-eight acres or thereabouts. The proposed lessee of the eighty-three acres soon encountered a fault in his workings

(*e*) Price *v.* Griffith, 1 De G. M. & G. 80; 21 L. J., N. S., C. C. 78.

(*f*) Lancaster *v.* De Trafford, 31 L. J., Chanc. 554.

which would have reduced his area to about eight acres, if the fault was the same as that marked as a boundary in the plan, and if it continued in the supposed altered direction. He therefore worked through the fault and got coal on the other side, alleging, after admission of new evidence, that the fault was a different one, and at any rate claiming the part so worked as part of his possession. The other mine owner filed a bill for an injunction, alleging that the fault was the same and was intended for a certain boundary. An injunction was granted by Wood, V. C. But it was held in the full Court of Appeal, that, even assuming the fault to be the same, the plaintiff could not have demanded specific performance by the lessors of a contract with a claim so grossly in excess of the quantity originally contemplated, and, therefore, that an injunction must be refused. There was uncertainty from the nature of the contract, but it was not to be supposed that one of the mine owners, who were both aware of both contracts, could be intended to take so small a portion, and the other so large a portion, of the whole property—and the same rule of construction would apply as in descriptions of the surface. It was also stated, as a matter of sufficient doubt, that the fault actually penetrated might not be the same as that marked on the plan, and that the burthen of reasonable proof lay on the plaintiff (*g*).

By an agreement in writing, in 1855, a lessee was to have two seams of coal, which were named, "lying under lands to be thereafter defined," in a small estate of twenty-seven acres, for a term of fourteen years. The lessee worked the mine, but abandoned it finally before the execution of a lease. The draft of a proposed lease was sent to the lessee, and no objection was made by him to the parcels, which comprised the whole estate. On a bill being filed by the lessor for specific performance, in 1857, after the mine had been abandoned, it was held, by

(*g*) Davis *v.* Shepherd, 35 L. J., Chanc. 581.

Romilly, M. R., that the parties themselves had put the proper construction on the agreement, and that the words as to definition applied to the estate, and not to the coal, which was meant to be wholly leased (*h*).

In the above case, the lessor was charged with suppression of facts as to the worthlessness of the mine. But the lessee, assisted by three other persons and before the agreement, had inspected the old workings, with the view of ascertaining the value of the coal. It was held, that the lessor was not bound to tell the lessee that he had worked the mine at a loss twenty years ago, and that the speculative character of the enterprise was no bar to specific performance.

A brick field was agreed to be let at a certain yearly rent. The tenant was to pay 3*s.* per 1,000 on the quantity of bricks made, and he agreed to make at least four millions yearly, or pay a rent equal to that quantity, and not to excavate beyond the depth of eight feet without special licence. It was held, that the agreement was not executory, and capable of being perfected by a reference to the Master to settle the terms, on the basis of exhaustion, that no permanent interest was intended to be passed, and that the tenancy was only from year to year (*i*).

An agreement purported to demise the workings of a seam of stone, and it was stipulated that the lessor should pay to the lessees certain sums for flags and stones of different kinds—that the lessor should provide a waggon, but that the loading should be paid for by the lessees—that the latter were to be paid a certain sum monthly, and the account settled monthly. A bill was filed by the lessees, alleging that the lessor had made various defaults in payment, and had ceased to work the quarry, and that the lessees had brought an action at law for discontinuing the work. Specific performance, and an injunction to restrain

(*h*) Haywood *v.* Cope, 25 Beav. 140; 27 L. J., Chanc. 468.

(*i*) Re Stroud, 8 Com. B. 502; 19 L. J., N. S., C. P. 117. See Haigh *v.* Jagger, 16 Mee. & W. 525; 2 Coll. C. C. 231.

the action, were prayed for. But it was held that the agreement only amounted to a particular mode of working the quarry, and that the remedy, if any, was at law (*k*).

Specific performance of a covenant to restore a gravel pit to its original state was refused, on the ground that the legal remedy was sufficient (*l*).

In agreements for leases of mines in work, time is taken to be as of the essence of the contract. In one case, a month's notice by the intended lessee was held sufficient to rescind the contract—although the completion did not entirely depend on the lessor, but also on other persons (*m*).

In another case, the intended lessor gave notice three months after the agreement, that, if the tenant did not begin to work a coal mine in a month, he should consider the agreement abandoned. Two years afterwards, the lessee entered and began to work, but he was resisted by the landlord. The work went on for a brief period, and was then abandoned. Five years afterwards, the tenant attempted to begin work again, and filed a bill for specific performance, which was dismissed with costs on the ground of delay (*n*).

Leases often contain covenants for renewal. When they are entered into by a tenant for life, under a power, such covenants are, of course, inoperative to bind those in remainder. But his real and personal assets, descendible or transmissible at his death, by will or otherwise, may be made liable for the breach of such a covenant. The covenant may be restricted to the lifetime of the lessor. But the rents to be reserved by the renewed lease must be fully warranted

(*k*) Booth *v.* Pollard, 4 Yo. & C. 61.

(*l*) Flint *v.* Brandon, 8 Ves. 159.

(*m*) Macbryde *v.* Weekes, 22 Beav. 533.

(*n*) Sharp *v.* Wright, 28 Beav. 150.

by the power, and, when the best improved rents are required to be payable, those reserved by the current lease may not always be adequate (*p*). If the covenant can be fairly executed, a specific performance will be decreed. But when it cannot be performed without risk to the donee of the power, or injury, or even embarrassment, to those in remainder, the aid of a Court of Equity will not be given, and the remedy, if any, must be sought by an action at law for damages (*q*).

A covenant for perpetual renewal may be inferred from the construction of the clause (*r*).

A promise founded on past expenditure will not raise any right for renewal in the absence of express agreement, or of an understanding to be distinctly implied by the conduct of the lessor. If the expenditure is incurred under a promise of renewal, the lessee will be entitled to the performance (*s*).

The conduct of the lessees will also be examined, to see if it has precluded them from claiming the right of renewal. Thus, where the lessees had covenanted that the mines should be "fairly got and regularly worked," and they had been "drowned out" during the first lease, and had so remained for many years to the end of the term, an issue was directed to inquire whether the drowning, or the continuance of the mines in that state, arose from any default of the lessees, before they could be held entitled to renewal. The lessees declining to try the issue, it was held that the onus of proving no default rested on them, and their bill was dismissed with costs (*t*).

A covenant for renewal will not be carried into effect, if there are conditions precedent, to be performed by

(*p*) Harnett *v.* Yielding, 2 Scho. & L. 549; Carne *v.* Mitchell, supra.

(*q*) See next chapter.

(*r*) The Copper Mining Comp. *v.* Beach, 13 Beav. 478.

(*s*) Robertson *v.* St. John, 2 Br. C. C. 140; Richardson *v.* Sydenham, 2 Vern. 447; Pilling *v.* Armitage, 12 Ves. 78.

(*t*) Walker *v.* Jefferys, 1 Hare, 431; 11 L. J., N. S., C. C. 209.

the lessee—as, for instance, a breach of the covenant to repair (*u*).

The relation between landlord and tenant is legal and not equitable. A lessor sought to recover arrears of rent as an equitable debt due from *cestuis que trust.* A lease of coal mines had been granted to the trustees of a company, at usual certain and tonnage rents, with the usual power of abandonment by notice. The company had worked the mines for a short period, and then abandoned them as unprofitable. No rent was ever paid. Eight years afterwards, the company was ordered to be wound up, and the official manager, denying the validity of the lease, gave notice to determine it. Before the expiration of the term, according to that notice, the lessor filed a bill against the company, and insisted that, the lease having been accepted by the company, they were the parties really interested as lessees, and that, having acted as lessees, they were liable in equity for the rent. It was held by Cranworth, L. C., that there might have been a remedy at law for use and occupation, or, by distress, or, if there had been an express contract for a lease between the lessor and the company, the lessor might have compelled a specific performance against the company or their trustees; but that the object of the bill was to give a new remedy against *cestuis que trust,* who had occupied the property—that the relation between owner and occupier was purely legal—and that no equitable right could be raised in favour of a lessor who claimed by a title paramount both to trustees and occupiers (*x*).

The prohibition contained in "The Companies Act, 1862," sect. 163, against enforcing a distress on the effects

(*u*) Job *v.* Banister, 2 Kay & J. 274; 26 L. J., Chanc. 125.

(*x*) Walters *v.* The Northern Coal Mining Comp., 25 L. J., Chanc. 633. See Clavering *v.* Westley, *infra,* Chap. 13, Sect. 2.

of a company which has been ordered to be wound up, only applies where the company are the tenants, and not when their trustees are the lessees (*y*).

In another case, where there was the usual covenant by the lessee not to assign without the consent of the lessor, the lessee had agreed in writing to give up his interest in a colliery to three other persons, who were defendants, and to execute all reasonable deeds for vesting the colliery in them. The colliery was worked under this agreement, and, at last, was abandoned. No consent was ever given by the lessor, nor was any rent paid to him. No deed of assignment was ever executed by the original lessee, but the defendants had assigned the colliery to an indigent workman. It was held by Romilly, M. R., that there was a good equitable assignment under the agreement, that the lessee had put his assignees into possession, and that they were liable at the suit of the lessor for the performance of the covenants. But this decision was reversed in appeal. It was said by Turner, L. J., that the agreement was not between the lessor and the defendants, and that any rights which might have accrued to the lessor from the possession of the defendants should be enforced at law—that a Court of Equity did not decree the performance of covenants in an agreement for a lease, nor treat the agreement as a tenancy, but it decreed specific performance of the agreement and execution of the lease, and left the parties to maintain their rights under the instrument at law. The Court would not enforce payment of rents to an intended lessee, under an agreement against an assignee of the intended lessee, for want of privity; and there was the same want of privity in this case (*z*).

A copyhold tenant in fee had granted a lease of wayleaves over his land. The lessees afterwards negotiated

(*y*) *In re* The Exhall Mining Comp., 33 L. J., Chanc. 595.

(*z*) Cox *v.* Bishop, 8 De G., M. & G. 815; 26 L. J., Chanc. 389.

for a new lease with a tenant for life under the lessor's will, which gave the tenant for life a power of leasing. The original lease contained the usual clause of abandonment by the lessee on giving notice. The negociation was silent on this point, but one of the letters referred to the new lease as a renewal of the old one. It was held, that the lessees were not bound to accept a new lease without the clause. It was doubted whether, in executory agreements, there was a presumption that usual stipulations in such cases should be inserted (*a*).

In another case, a tenant for life of copyhold lands, without power to grant leases, agreed to grant a way-leave for sixty-three years, with liberty to give up the way at a year's notice. The lessee was bound in that event to restore the ground. The testator died, and his widow, who was then absolutely entitled to the lands, granted a lease for twenty-one years, under the direction of the Court, with a recital in it that the term was intended to be prolonged to sixty-three years by successive licences from the lord of the manor, which could only be procured for twenty-one years at one time. This lease also contained a covenant for restoring the land, and also a power of abandonment, as in the agreement. The lands and the way-leave rent were then sold separately. It was stated in the particulars of sale that the lands were sold subject to the way-leave, and to a renewal of it. The purchaser of the lands, on the expiration of the lease, without any concert with the purchasers of the rent, entered into a new agreement with the lessee of the way for a further term of sixty-three years, with further rights, and at an advanced rent, and they agreed to determine the original contract under the power reserved in it to the lessee. A bill was then filed by the purchasers of the rent for claiming the benefit of the original agreement. After the filing of the bill the lessee gave notice of his desire to determine that

(*a*) Ricketts *v.* Bell, 1 De G. & S. 335.

agreement. It was held, that the original term of sixty-three years must be considered as a subsisting right, that the lessee might have determined that agreement in a *bonâ fide* manner, but that the owner of the land had no right to defeat it, and that it was contrary to equity thus to deprive the plaintiffs of their purchased rights (*b*).

Undue delay on either side will prevent specific performance generally. Thus, a person in possession of a colliery agreed to take a lease on terms to be settled by arbitration. The award was made, but was not brought to his knowledge for two months, and two months after that he objected to its validity, but offering to come to an understanding. Afterwards the agents of both parties examined the mines for a new arrangement. The proposed lessee quitted possession a few months afterwards. Nearly four years after this abandonment the lessor filed a bill for specific performance. But it was decided that the delay was fatal to the relief. An account was decreed (*c*).

When the delay is caused by the plaintiff's own acts in seeking to set aside an award, it is equally fatal to relief (*d*).

No relief will be given when only one of the parties can claim specific performance of an agreement or an award, and the other party is precluded from seeking this remedy in respect of his interest or benefit (*d*).

A lease of mines will not be set aside for fraud, or for invalidity, if there has been undue delay in seeking relief (*e*).

(*b*) Wood *v.* Marquis of Londonderry, 10 Beav. 465; 16 L. J., N. S., C. C. 460.

(*c*) Eads *v.* Williams, 24 L. J., C. C. 531.

(*d*) Blackett *v.* Bates, 2 Hem. & M. 270; 34 L. J., Chanc. 515; 35 Ibid. (Appeal) 324.

(*e*) Ernest *v.* Vivian, 33 L. J., Chanc. 513.

Section IV.

LICENCES TO WORK MINES.

It has been before remarked, that there is a great distinction between a lease of mines and a licence to work mines. The former is a distinct conveyance of an actual interest or estate in lands, while the latter is only a mere incorporeal right to be exercised in the lands of others. It is a profit *à prendre*, and may be held apart from the possession of land. In this respect it differs from those incorporeal rights called easements, which require a dominant tenement for their existence.

We may now proceed to notice the difference in the creation of those interests, and to describe the general properties of a licence, which will be found to have much resemblance, in many respects, to an actual lease.

In order to ascertain whether an instrument must be construed as a lease or a licence, it is only necessary to determine whether the grantee has acquired by it any estate in the land, in respect of which he might bring an action of ejectment. If the land is still to be considered in the possession of the grantor, the instrument will only amount to a licence, and though the grantee of the licence will certainly be entitled to search and dig for mines according to the terms of his grant, and appropriate the produce to his own use, on payment of the stipulated rent or proportion, yet he will acquire no property in the minerals till they are severed from the land, and have thus become liable to be recovered in an action of trover. It must be remembered, that in order to constitute an actual lease of mines it is not necessary for the grantor to acquire any right or interest in the surface; for minerals have been shown to be capable of forming a distinct inheritance in the lands of which they are part, and consequently, an actual estate may be both created in and restricted to any

specified kinds of minerals. But a licence is created only where the grantor has acquired no right of property to *any part* of the soil or minerals, till they are separated from the general inheritance.

If a man, says Lord Coke, grant to another to dig turves in his land, and to carry them at his will and pleasure, the land shall not pass, because but part of the profit is given, for trees, mines, &c., shall not pass (*f*).

It has certainly been determined that the intention of the parties may constitute an actual demise, whether the words be in the form of a licence, or a covenant or an agreement. But it must sufficiently appear from the construction of the granting part, that it is clearly the intention of the parties that the one should divest himself of the possession, and that the other should come into it for a determined time (*g*). It must be sufficiently apparent that there is nothing in the grant of a liberty to work mines at all inconsistent with the possession being still reserved to the grantor.

This distinction has been clearly recognized by several decisions.

In a case before cited, there was a covenant for a person and his heirs and assigns at all times thereafter to enter and search and dig for coal and other minerals, and carry them away to their own use. It was decided, that the words only amounted to a licence or liberty to dig and work the mines (*h*).

In another case, an owner of the land granted full and free liberty to work for tin, copper and other minerals in the Crinnis Mines, in the county of Cornwall, for twenty-one years; and there was a similar lease relating to another mine called Campdown. It was held by Lord Eldon, that this was nothing like a demise of mines, though he did not mean to say that similar principles would not apply to it.

(*f*) Co. Litt. 4 b.

(*g*) See Bacon's Ab. Leases, K.

(*h*) Chetham *v.* Williamson, 4 East, 469; 1 Smith, 278.

These leases, as they are called, were not demises of the mines, but simple grants of licences and liberties to work, and there was no estate whatever in the grantees (*i*).

The same case afterwards came before the consideration of the Court of King's Bench. The indenture was described as giving also full liberty to the grantees to erect *within the limits of the set thereby granted* sheds, engines and buildings, and to turn all water and watercourses to their use, and to cut any channels over the land for conveying the water; and there was an exception to the grantor of full liberty to make use of any of the adits or levels, and of sinking any shafts for the purpose of working mines in other lands, and of conveying any watercourse over the *premises granted*. It was contended that the language of these grants and exceptions and the clause of reentry which enabled the grantor and his heirs to repossess and enjoy the lands in case of breach of any of the covenants, showed that an interest in the soil was intended to pass. But it was held by the Court that the deed operated as a licence only. Lord Tenterden, in delivering the judgment of the Court, observed, that the doubt had arisen from the inaccuracy of some of its expressions, which seemed to import that the grantor supposed himself to have done that by the granting part of the deed which, it was insisted, the words of the granting part did not warrant. But the instrument, though inaccurate, was a regular formal deed, containing all the formal and orderly parts of a deed of conveyance enumerated by Lord Coke, except the clause of warranty (*k*). One of the proper offices of the premises or granting part of a deed, as stated by Lord Coke, "was to comprehend the certainty of the tenements" to be conveyed. This indenture, in its granting part, did not purport to demise the land, or the metals or minerals in it, but a liberty to dig for metals and minerals, and to dispose of *those only that should be found*

(*i*) Norway *v.* Rowe, 19 Ves. 158. (*k*) Co. Litt. 6 a.

there within the term, the grantor parting with no estate or interest in the rest. If so, the grantor had no estate or property in the land itself, or any particular portion of it, or in any part of the ore, metals or minerals, which are not obtained. He acquired no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it. It had been contended that there were words in the deed which showed an intent to demise, particularly in the clause of re-entry. A proviso of that description was in itself not less applicable to a licence to dig and work for mines than to a demise of metals and minerals, because, under such a licence, works may be effected, and a corporal possession had, which it might be competent for the grantor to resume. The expressions in the deed might probably be attributed to want of care and caution in its preparation; but, supposing it otherwise, still they could have no further effect than to show that the grantor who used them *supposed* that the soil or minerals, and not a mere liberty or privilege, passed by his deed; and if the words used in the granting part of the deed were of doubtful import, and would bear the construction contended for, they might, with the aid of others showing the intent, be sufficient to pass the land or soil, and support an action of ejectment. But the words of the granting part were plain and not of doubtful import; and as the proper office of that part of the deed is to denote what the premises are that are granted, and is the place where the intent of the grantor, and what he has actually done in that respect, is more particularly to be looked for, recourse must be had to it to see whether he has actually granted what it is urged his expressions denote that he supposed he had granted, for the question properly was not what he supposed he had done, *but what he really had done by his grant* (*l*).

It will appear, therefore, from the preceding case, that,

(*l*) Doe *d.* Hanley *v.* Wood, 2 Barn. & Ald. 724.

notwithstanding the rules of law that a grant is to be taken most strongly against the grantor, and that the intention of the parties is, if possible, to be supported, the deficiency of the granting part of a deed, in the description of the thing granted, will not be assisted by the intention of the parties expressed in the other parts of the deed, unless that description may easily admit of an interpretation corresponding with the other portions of the deed. No expression of intention, it must be presumed, however strong, if it is not found in the proper place, will suffice so far to control the operation of this rule as to vest any other premises in the grantee than those mentioned and described in the granting part. A more liberal rule of construction prevails with respect to wills. But a deed is a formal instrument, and is interpreted according to the strict rules of construction. But it will be obvious that there may be recitals or expressions even in a deed, though they might not be discoverable in the deed mentioned in the above case, which might be construed by a Court of Equity as an agreement to perform what that particular act had failed to accomplish. In like manner, it is conceived, from the more indulgent construction which prevails in the interpretation of wills and agreements, expressions of still less force contained in such instruments might be held sufficient to effectuate the supposed intention of the parties. But it may well be doubted whether the expressions made use of in the above deed would be sufficient to denote any further intention than that established by the decision.

A licence to work mines is often framed, as in the above case, in the same manner as a regular demise, with formal provisoes and covenants entered into by both parties. The observations which have already been made with respect to the forms of leases will, therefore, be generally applicable to licences of this description (*m*).

(*m*) See Muskett *v.* Hill, 7 Scott, 855; 5 Bing., N. C. 694; 9 L. J., N. S., C. P. 201.

But it remains to consider some important incidents which are peculiar to licences.

It is now quite settled that a beneficial privilege in land, as a licence to work mines, can only be granted by deed (*n*). It may be granted in fee simple, or for life, or for years. If granted for years, it is not strictly a hereditament, but an incorporeal right, transmissible like other interests so limited. In all cases, even if it exist for a year or a day, it must be both created and transferred by deed. It was assignable only by deed before the passing of the Statute of Frauds (*o*). A covenant or any instrument under seal will operate as a grant, if the intention is sufficiently expressed (*p*).

A licence, which does not amount to any direct interest in the land itself, may be given by parol (*q*).

This distinction, which affects the whole nature of a licence and its incidents, is thus explained by Vaughan, C. J., in a case appearing in his own Reports (*r*): "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, without which it had been unlawful—as a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to

(*n*) Co. Litt. 9 a; Fentiman *v.* Smith, 4 East, 107; Hewlins *v.* Shippam, 5 B. & C. 221; Cocker *v.* Cowper, 1 Cr. M. & R. 418, overruling Taylor *v.* Waters, 7 Taunt. 384. See also Bryan *v.* Whistler, 8 B. & C. 288; Liggins *v.* Inge, 7 Bing. 682; Wallis *v.* Harrison, 4 M. & W. 538; Ruffey *v.* Henderson, 17 Q. B. 574; 21 L. J., Q. B. 49.

(*o*) Wood *v.* Leadbitter, 13 M. & W. 838; Bird *v.* Higginson, 2 Ad. & E. 696; 6 Ad. & E. 824.

(*p*) Holmes *v.* Sellor, 3 Levinz, 505.

(*q*) See Smart *v.* Jones, 33 L. J., C. P. 154; 15 C. B., N. S. 717.

(*r*) Thomas *v.* Sorrell, Vaugh. 351. See also Brooke, Ab. "Licence," pl. 15.

the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are licences; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten and in the wood burnt. So as, in some cases, by consequence and not directly, and as its effect, a dispensation or licence may destroy and alter property."

Every licence, therefore, that authorizes such acts as not only require to be performed *upon* the land, but which gives some usufruct *of the land itself*, is properly a grant of an incorporeal hereditament, and must be created and transferred by deed. But a licence, that amounts only to authorize such an act as excuses a trespass, and which regards rather the act itself than its connection with the land, or that merely amounts to a bare permission or dispensation to do or suffer certain temporary acts, gives no real beneficial interest in the land, and may pass by parol.

The subject of revocation of licences, which depends on the preceding distinction, has been lately fully explained in the case of Wood *v.* Leadbitter (*s*).

A parol licence, limited in its scope as above stated, when fully executed, and not depending on continuous acts, cannot be countermanded. But as long as it remains executory it may be revoked, and it cannot be transferred to another. For such a licence is only personal, and lasts only so long as the land belongs to the grantor, or so long as he permits its exercise (*t*). Any expenditure incurred, or valuable consideration given by the grantee, will not avail to make the licence less revocable (*u*).

But a licence, by which an incorporeal hereditament is

(*s*) Supra. See also Bird *v.* Higginson, supra; Perry *v.* Fitzhowe, Q. B. 147.

(*t*) Winter *v.* Brockwell, 8 East, 308; Liggins *v.* Inge; Wallis *v.* Harrison, supra.

(*u*) Wood *v.* Leadbitter, supra.

granted, or any licence coupled with an interest (*x*), cannot be revoked. On this point, Alderson, B., in giving the judgment of his Court, in Wood *v.* Leadbitter, said: A licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and, on the other hand, a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, then the licence is a mere licence; it is not an incident to a *valid* grant, and it is therefore revocable. Thus, a licence by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the licence, would have been unlawful. If the licence be, as put by Vaughan, C. J., a licence not only to hunt, but also to take away the deer, when killed, to his own use, this is in truth a grant of the deer, with a licence annexed to come on the land: and supposing the grant of the deer to be good, then the licence would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol licence to come on my lands, and there to make a watercourse, to flow on the land of the licensee. In such a case, there is no valid grant of the watercourse, and the licence remains a mere licence, and therefore capable of being revoked. On the other hand, if such a licence were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the licence would be irrevocable.

Upon the subject of licences, there arises an important question with respect to mines—viz., whether those instruments are exclusive of the rights of others?

(*x*) Wood *v.* Manley, 11 Ad. & E. 34.

It may be stated, as a general rule, that a licence to work mines is not exclusive of the similar rights of the grantor, or of those who may claim under him by virtue of a similar authority.

This was decided in a very early case. Lord Mountjoy, being seised in fee of the manor of Canford, sold it in fee with the reservation, and with a covenant on the part of the purchaser that Lord Mountjoy, his heirs and assigns, might dig for ore in the lands (which were great wastes), parcel of the manor, and dig turf also for the making of alum. It was held that, notwithstanding this grant, the purchaser, his heirs and assigns, might dig also, like the case of common *sans nombre* (*y*).

In the case of Chetham *v.* Williamson (*z*), a similar reservation of coals was made in a purchase deed, and the licence was held not to confer an exclusive right to the coals. Lord Ellenborough observed, that no case could be named where one who had only a liberty of digging for coals in another's soil had an exclusive right to the coals, so as to enable him to maintain trover against the owner of the estate for coals raised by him; and after citing the case of Lord Mountjoy, said that those who compared it to a grant of common *sans nombre*, used that as the strongest instance to show that it could not be an exclusive right.

It appears, therefore, that an exclusive right to minerals will not necessarily be conferred by the grant of a licence to work them. But it must not be concluded from these decisions that the licence to work may not be in such a form as effectually to vest in the grantee a sole and undisturbable right to the minerals. It may be generally laid down, that if it appear to be the intention of a deed of grant or licence that the grantee should be solely and exclusively entitled to work for minerals, the grantor will be after-

(*y*) Co. Litt. 165 a; Godb. 18; 1 And. 307; 4 Leon. 147.

(*z*) 4 East, 469.

wards precluded from abridging or derogating from his grant by any attempt to exercise a right, similar only indeed, but incompatible with his former disposition. This intention should properly appear in the granting part; for the use of the granting part, as has been observed (*a*), is to give an accurate description of the thing granted. It is an essential part of the thing granted, that it is freed from the interruptions and claims of others. If the description should fail in this respect, but the intention may still be gathered from other parts or the general scope of the instrument, it would seem that, at law, the right to work would not be exclusive, but that the deed would create an equitable contract for an exclusive right, which would be binding upon the grantor and those claiming under him. If this right could be considered to be included in a covenant entered into by the grantor, or if any particular recitals or expressions should suffice to constitute a legal covenant, such a contract would, even at law, be held to run with the land, and bind the assignees of any of its profits.

It would be useless, in the absence of decision, to consider by what particular expressions an exclusive right may be granted. It was contended, in one case, that the grant of "full and free liberty" to work was sufficient for that purpose, on the ground that if two persons had full liberty to work the mines, there would be a great interference with the rights of each other (*b*). But it was not necessary to investigate that point in the case; and it may be safely asserted that such expressions would not be sufficient to confer an exclusive right; for they amount to no more than what would be implied by law. There must be some expression adequate to give the grantee a sole and exclusive privilege, incapable of being disturbed or interfered with (*c*). Questions of this nature seldom occur in practice; for almost all mines of any prospective value, not in the hands

(*a*) See supra.

(*b*) Doe *d.* Hanley *v.* Wood, 2 Barn. & Ald. 724.

(*c*) See Appendix for the form of an exclusive licence.

of the proprietors themselves, are worked under leases, when these can be obtained. If, however, the minerals of a district were worked under two different licences, and by different adventurers, it is quite clear that such questions might become not only of consequence, but of difficult solution. In different mining adventures carried on in search of distinct kinds of minerals, there might arise abundant causes of dispute with respect to interference. When the same kind of mineral is the joint object of attainment, the rights of the parties might become still more embarrassing. In cases of actual interference in the course of mining operations, the claimants, under the first grant, would be entitled to a general preference. *Qui prior est in tempore, potior in jure.* But the mode of working, the nature of the interference, the relative situation and priority of any particular operations, the designs of the parties, would all become important ingredients in the settlement of such questions; and it would appear, from analogous cases on mining subjects, that an expenditure of capital, labour and time might in themselves create an equitable right to a sole enjoyment of the particular mines (*d*).

From the above observations, it will be sufficiently obvious how important it is that mining adventurers should be furnished with either an exclusive licence or a regular lease. The latter is, in many respects, the preferable instrument.

It has been seen before, that leases, even for chattel interests, are now, under the proviso for making them void on breach of the covenants or conditions, only voidable at the election of the lessor—and that the same construction is applicable to licences for years (*e*). But a licence, whether for a freehold or a chattel interest, may, upon forfeiture, be determined by simple notice.

In the above case of Roberts *v.* Davey, the licence was for twenty-one years, and it was observed by Mr. Justice

(*d*) See Norway *v.* Rowe, 19 Ves. 156—159.

(*e*) See last section, and Doe *d.* Hanley *v.* Wood, 2 Barn. & Ald. 724; Roberts *v.* Davey, 4 Barn. & Ad. 672.

Littledale, that if it had been a freehold lease of land, it would have been necessary for the lessor to avoid it by entry, or, if that were impossible, by claim. But that instrument was a mere licence to dig, and did not pass the land; an actual entry, therefore, was unnecessary to avoid it; but by analogy to what was required to be done in order to determine a freehold lease, it seemed to follow that, to put an end to the licence, the grantor should have given notice of his intention so to do. The giving of such notice in the case of such an instrument was equivalent to an entry or claim by the grantor of a freehold estate to which a condition is annexed (*f*).

It was held, in a case before cited (*g*), that a proviso for re-entry was in itself not less applicable to a licence to dig than to a demise of minerals, because under such a licence works might be effected, and a corporal possession had, which it might be competent for the grantor to resume. But this was not meant to convey the impression of the Court that entry was as necessary for avoiding a licence as a freehold lease. A licence to work mines, whether it be for a freehold or a chattel interest, is still an incorporeal hereditament, unattended with any present estate in the land out of which it issues. As such, it is, strictly speaking, incapable of actual entry. The works may be entered upon, but these do not constitute the subject of grant. It follows, therefore, that any such licence may be determined by acts which are applicable to the nature of the property, viz., by notice of the intention of the grantor to take advantage of the forfeiture committed by his grantee; and this notice, it is presumed, may be either express, or implied from acts of entry or of notorious ownership. There is no distinction, in this respect, between licences for freehold interests and for years.

It is a general rule of law, that no rent can issue out of

(*f*) 4 Barn. & Ad. 672.
(*g*) Doe *d.* Hanley *v.* Wood, 2 Barn. & Ald. 740.

any incorporeal hereditament, because such inheritances are incapable of being distrained upon (*h*). But the Crown is excepted from this rule, because by its prerogative all the lands of the lessee are liable to distress for rent (*i*). Rent, therefore, cannot, *eo nomine*, be reserved upon a licence to work mines. Indeed, it may be doubted whether, in the case of an actual demise of mines without land, any rent liable to remedy by distress can issue; for the works would not be demised, and there would be nothing on the subject of demise to distrain. But the reservation of rent will, in either case, be good by way of contract, for the non-performance of which the lessor will be entitled to an action of covenant or debt, for the lessor might otherwise be left without a remedy (*j*).

A covenant will run with the land, in the case of a licence, as in that of a lease. Thus, three licensees under a deed entered into joint and several covenants for payment of compensation for damage done to the surface by mining works. Two of the licensees assigned their interest to another person. In a claim for compensation, it was held, that the assignee was liable for the whole amount (*k*). The same rule applies to freehold and chattel interests (*l*).

Payments under a parol licence to dig earth and make bricks have been held to be in the nature of rents, and to pass with the land (*m*).

In other respects, the incidents and construction of licences seem to correspond with what has already been said upon the subject of mining leases.

From the preceding observations and cases it will appear very important, when any mining adventure is in contemplation, to ascertain whether the subject of speculation is

(*h*) Co. Litt. 47 a, 142 a, 144.

(*i*) Ibid. 47 a; 5 Co. Rep. 4, 56.

(*j*) Dalston *v.* Reeve, Lord Raym. 77.

(*k*) Norval *v.* Pascoe, 34 L. J., Chanc. 82.

(*l*) Portmore *v.* Bunn, 1 Barn. & C. 694.

(*m*) Ex parte Hankey, 1 Mont. & Mac. 247.

entirely freed from previous grants and reservations. In cases of freehold leases this subject should receive particular attention, although it has been seen that a sufficient entry may be completed by persons acting under the authority of the grantor. Allusion has already been made to this necessity for caution in treating of the relation of grantor and grantee. But prudence is equally required, and in all cases of grant, whether for freehold or personal interests, in adjusting the rights of different companies of adventurers. It very frequently happens, in mining districts, that a mine is worked under a licence or a lease, containing the usual clauses of forfeiture and re-entry; and from the want of success the enterprise is virtually abandoned by the company. It is not uncommon for another lease or licence to be granted to other persons, or even to the same persons, in trust, for another company of speculators, a great part of whom may have been members of the old company. At any rate, the mining agent and the leading directors of the first company may continue in the same capacity and situation with respect to the new company. There may be little change in any respect, except in the ordinary event of taking a new interest in the mine and in the substitution of a few dormant proprietors. All acts of ownership may thus be referred to either company, if the interest under the former grant is not effectually extinguished.

It very frequently occurs, particularly in operations for obtaining the metallic ores, that a second or a subsequent adventure is attended with great, and perhaps unexpected, success. Questions of prior claim may slumber when the result is doubtful, but when the prospects of a mine begin to be realized, these questions may cause, not only, as in Hanley *v.* Wood, great embarrassment, but great danger of a successful interference. A long course of litigation may ensue, and the mine may either cease to be worked, or the profits may flow into the hands of those who may be eventually declared to possess no title to them. It is no less the duty of the lessor as of the miner to ascertain that any

grant under which mining operations are conducted is not liable, from negligence and inattention, to be in any manner prejudicially affected by claims of prior origin, which should have been legally destroyed by properly carrying out the conditions which control them. In leases under powers, it should be particularly ascertained that there is no prior lease which may prevent any other from being granted. To the lessor, indeed, it might be of no consequence whatever, if the terms of the subsequent grant were equally favourable to his interests as those of the first. But every lessor is morally, if not legally, bound to furnish voluntarily, in such cases, a valid title to the property he professes to dispose of, and especially in those particular matters which the lessee may not have the means of investigating for himself. On the other hand, it will readily be admitted that no circumstance can be more vexatious to a mining adventurer, than after a long course of expense, doubt and anxiety, to be harassed by prior claims, when at length the enterprise has been favoured with the fulfilment of his hopes.

In such cases, however, a Court of Equity will often refuse to lend its assistance in favour of persons urging former claims, and will also interfere to prevent injustice (*n*).

In one case of this description, a motion for a receiver on the part of the first lessees was refused. Lord Eldon, on that occasion, observed, that in disturbing possession with reference to such a subject as mines, the Court would be taking an extremely strong step; especially if great expenditure had been applied without the interposition of other claimants, until it was excited by the profitable result of that expenditure, in which they would take no share (*o*).

(*n*) See Chap. X. Sect. 4.

(*o*) Norway *v.* Rowe, 19 Ves. 156.

Section V.

STAMPS AND REGISTRY.

I. By the Stamp Act, 13 & 14 Vict. c. 97, leases of any lands or hereditaments which are granted in consideration of a fine or premium, and without any yearly rent amounting to 20*l.*, are liable to the stamp duties as for the conveyance on the sale of lands for a similar amount. If leases are granted both in consideration of a fine or premium, and also of a yearly rent of 20*l.* or upwards, they will be liable both to the preceding duties and also to the duties payable on an ordinary lease with a reservation of rent.

The ordinary duties are now thus arranged (*o*):—

	For 35 years or less.	For more than 35 years, but not more than 100 years.	For more than 100 years.
£	£ s. d.	£ s. d.	£ s. d.
Rent not exceeding 5	0 0 6	0 3 0	0 6 0
„ „ 10	0 1 0	0 6 0	0 12 0
„ „ 15	0 1 6	0 9 0	0 18 0
„ „ 20	0 2 0	0 12 0	1 4 0
„ „ 25	0 2 6	0 15 0	1 10 0
„ „ 50	0 5 0	1 10 0	3 0 0
„ „ 75	0 7 6	2 5 0	4 10 0
„ „ 100	0 10 0	3 0 0	6 0 0
For every other £50, or fractional part	0 5 0	1 10 0	3 0 0

Where there is a fine or premium, and also a rent of 20*l.* or upwards, the lease is liable as well to *ad valorem* duty in respect of the fine as to the duty for rent.

Leases for a life or lives, not exceeding three, or for a term of years determinable with a life or lives not exceeding three, *by whomsoever granted*, and leases for a term absolute, not exceeding twenty-one years, granted by ecclesiastical corporations, either aggregate or sole, are excepted when the duties payable would amount to 1*l.* 15*s.*

(*o*) 13 & 14 Vict. c. 97; 17 & 18 Vict c. 83.

or upwards, and when a fine is paid; but if no fine is paid, they will be subject to the ordinary duties payable on the amount of rent.

Leases of mines or minerals, with or without any other lands or hereditaments, *where any portion of the produce* is reserved in money or kind, are thus regulated: if the value of the reserved produce is stipulated to *amount at least to a given sum per annum*, or be limited not to exceed a given sum per annum, the duty is charged in respect of the highest of such sums given or limited for any year of the term; and if a yearly sum is reserved in addition to such produce, but without such stipulation or limitation, the duty is charged in respect of the yearly sum—and where both a certain yearly sum and also such produce, with such stipulation or limitation, the duty is charged on the aggregate of the yearly sum, and also of the highest yearly amount or value of such produce.

A lease, *not otherwise charged*, is subject to a duty of 1*l.* 15*s.* This stamp will often be required to cover other matters introduced in mining leases, in addition to the duties above stated. It is also the proper stamp when no certain rents are reserved.

Counterparts and duplicates of leases which are charged with a duty not exceeding 5*s.*, are liable to the same duty as the originals, and counterparts of all other leases are liable to the duty of 5*s.*, with a progressive duty of 2*s.* 6*d.*, but the latter must be impressed with a particular stamp.

All agreements, involving value to the amount of 20*l.* or upwards, are charged with a duty of 2*s.* 6*d.*, and a progressive duty of 2*s.* 6*d.*

An instrument under seal, amounting only to an agreement for a lease, requires a stamp of 1*l.* 15*s.*, as a deed not otherwise charged (*p*).

Schedules or inventories of lands, fixtures, or other goods and effects, or containing terms and conditions or

(*p*) Clayton *v.* Burtenshaw, 5 Barn. & C. 41; 7 Dowl. & R. 800.

other matter to be referred to and given in evidence as part of or material to any agreement, lease, deed, or other instrument, but which shall be separate from, and not endorsed on or annexed to it, are charged with the same duty as the agreement, lease, deed or other instrument, where such duty does not exceed 10*s.*, and in other cases with a duty of 10*s.*, with progressive duty in every case of the same amount as the principal duty.

Assignments and surrenders of leases on any other occasion than a sale or mortgage are charged with the same duties as the leases, when the duty does not exceed 1*l.* 15*s.*, and in other cases with a duty to that amount.

The progressive duty on all leases and transfers amounts to 10*s.*, except where the *ad valorem* duty is less than that sum, and then to the same amount as the *ad valorem* duty.

If an inventory be referred to by an agreement as annexed to it, although it be not annexed till after the execution of the agreement, it will be counted as part of the agreement in fixing the duty, and it is unimportant that the inventory is stamped as such (*q*).

A licence in fee to work mines would appear to be chargeable in the same manner as an absolute conveyance; for it amounts to the absolute sale of an incorporeal hereditament. In other respects there seems to be no distinction between leases and licences. A licence for a limited period amounts to a lease or tack, and comes within the meaning of the schedule of the act as an hereditament, under the title "Lease;" and as a right or interest in lands, under the title "Conveyance."

The stamp law has been much improved by the statute 13 & 14 Vict. c. 97. In cases of doubt as to the proper stamp, any instrument, whether previously stamped or not, may be submitted to the opinion of the commissioners, who are required, on payment of 10*s.*, to affix a particular

(*q*) Veal *v.* Nicholl, 1 Mood. & Rob. 218.

stamp, denoting the full and proper duty to be paid. The sufficiency of this stamp cannot afterwards be questioned in any court. An appeal is also allowed from the Stamp Office on a case stated to the Court of Exchequer, if it is thought that too much duty is demanded. The penalty in stamping an instrument is 10*l.*, and if the duty exceeds 10*l.*, interest at 5*l.* per cent. per annum, but not beyond the amount of the duty. The penalty may be remitted within twelve calendar months, on showing to the satisfaction of the commissioners that the instrument was not duly stamped by reason of accident, mistake, inadvertency or urgent necessity, and without design to evade the duty.

By a late statute for the amendment of common law procedure, an instrument improperly stamped may be received as evidence at any trial, on payment of the whole or deficient part of the duty and the penalty, and a further penalty of 1*l.* The judge must determine the duty (*r*).

If the instrument be lost, the want of proper stamps cannot be supplied (*s*). But a party objecting to secondary evidence of a lost document for want of stamp must show that it was not stamped (*t*).

A stamp may be affixed, even in the course of a trial (*u*). In equity, a cause will be allowed to stand over to enable a proper stamp to be obtained, or the cause may proceed upon an order that the decree shall not be delivered out till the instrument has been produced to the registrar duly stamped (*v*). It has been decided, that if a deed bearing the proper stamp is produced, but which is proved not to have been stamped at the time of its execution, it will be receivable in evidence, without inquiry whether the stamp was affixed on payment of the proper penalties (*x*). If the

(*r*) 17 & 18 Vict. c. 125, ss. 28, 29.

(*s*) Rippener *v.* Wright, 2 Barn. & Ald. 478; Smith *v.* Henley, 13 L. J., N. S., C. C. 221.

(*t*) Closmadene *v.* Carrel, 18 Com. B. 36; 25 L. J., C. P. 216.

(*u*) Burton *v.* Kirkby, 7 Taunt. 174; 2 Marsh. 480.

(*v*) Huddleston *v.* Briscoe, 11 Ves. 595; Chervet *v.* Jones, 6 Madd. 267.

(*x*) Rex *v.* The Inhabitants of Preston, 3 Nev. & Man. 31; 5 Barn. & Ad. 1028.

stamp is required by law to be affixed within a given time, the Court must, of course, inquire into the time (*y*). But this does not apply to leases.

Different quarries or mines may be demised by the same deed, at distinct rents, and one stamp for the gross amount of the rents will be sufficient (*z*).

If a third party enter into a covenant for payment of the rent, the lease stamp will be sufficient; for the covenant was only auxiliary to the lease, and the question in such cases is, what is the leading character of the instrument (*a*).

If a fine is proved to have been paid, but it does not appear in the deed, the lease stamp alone will also be sufficient. The duty is regulated by the consideration appearing on the face of the instrument (*b*). But parties are subject to a heavy penalty, in not expressing the full consideration, in order to evade the payment of the full duties (*c*).

An instrument stated that it was agreed to sell certain upper veins or beds of coal, at the rate of 75*l.* per acre, and that if coal should be worked in any year exceeding 100*l.* at that rate, the excess should be paid for. It was held, that a stamp of 1*l.* 15*s.* was sufficient, without an *ad valorem* stamp, as in a conveyance (*d*).

II. All deeds and conveyances concerning estates within the North (*e*), East (*f*) and West (*g*) Ridings of the

(*y*) Ibid.; and see Huddleston *v.* Briscoe, 11 Ves. 595.

(*z*) Boase *v.* Jackson, 6 Moore, 480. See Blount *v.* Pearman, 1 Bing., N. S. 408.

(*a*) Pratt *v.* Thomas, 4 Carr. & P. 554.

(*b*) Doe *d.* Kettle *v.* Lewis, 10 Barn. & C. 673; Doe *d.* Higginbottom *v.* Hobson, 3 Dowl. & R. 186. See Duck *v.* Braddyl, 13 Price, 455; Robinson *v.* Macdonnel, 5 Maul. & Sel. 228.

(*c*) 48 Geo. 3, c. 149, s. 22.

(*d*) Phillips *v.* Morrison, 12 M. & W. 740; 13 L. J., N. S., Exch. 212. See Rex *v.* Ridgwell, 6 B. & C. 665; Wilmott *v.* Wilkinson, Ib. 511; Mayfield *v.* Robinson, 7 Q. B. 486.

(*e*) 8 Geo. 2, c. 6.

(*f*) 6 Anne, c. 35.

(*g*) 2 & 3 Anne, c. 4; 5 & 6 Anne, c. 18.

county of York, and within the county of Middlesex (*h*), are directed to be registered. The registry is expressed in the act for the West Riding of Yorkshire to be at the election of the parties. But in all the acts, all deeds and conveyances shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial thereof be registered in the manner prescribed before the registry of the memorial of the deed under which the subsequent purchaser or mortgagee shall claim.

None of these acts extend to copyhold lands, or to *leases* at rack-rents, or *not exceeding twenty-one years* where the actual possession and occupation go along with the lease.

All conveyances of lands, being part of 95,000 acres in the Bedford Level, are also directed to be registered. And it is enacted, that no lease of such lands, *except leases for seven years or under, in possession*, shall be of force but from the time of registry (*i*).

The registry of leases in Ireland is regulated by similar provisions (*k*).

Leases under powers or by appointment must be registered (*l*).

The new registry of a lease is not cured by registering an assignment in which the lease is recited (*m*).

The exception of leases at rack-rents is not applicable to mines. But the exception of leases, not exceeding twenty-one years, exempts a large proportion of mining leases in the register districts from being registered. If such a lease be assigned for a valuable consideration, it will still remain exempt from registry. But if it be assigned in mortgage, or in any manner by which the actual

(*h*) 7 Anne, c. 20; 25 Geo. 2, c. 4.
(*i*) 15 Car. 2, c. 17, s. 8.
(*k*) 6 Anne, c. 2.
(*l*) Scrafton *v.* Quincey, 2 Ves. 413.
(*m*) Honeycomb *v.* Waldron, 2 Str. 1064; Jack *v.* Armstrong, 1 Huds. & Bro. 727; Fary *v.* Smith, Ibid. 735.

possession and occupation do not go along with the lease, it ought to be registered, as well as the assignment (*n*).

The act for promoting the voluntary registration of the title to real estates, 25 & 26 Vict. c. 53, is confined to estates of freehold tenure, and leasehold estates in freehold lands.

An applicant must state, in any description of lands, whether he claims the mines. Unless they are expressly mentioned, they will be deemed not to be included in the description. If they are mentioned, the registrar must give especial regard to them in the subsequent proceedings.

(*n*) See Fary *v.* Smith, supra.

CHAPTER IX.

THE RIGHT TO GRANT LEASES.

I. *The general Right to grant Leases.*
II. *Leases under Powers.*
III. *By Ecclesiastical Persons and Others.*
IV. *By Tenants in Tail, and by Married Persons with respect to the Lands of the Wife.*
V. *General Observations.*

Section I.

THE GENERAL RIGHT TO GRANT LEASES.

As the right of granting leases and licences is intimately connected with the subject of mines, it is proposed in this chapter to give a concise account of the persons who are enabled to exercise such acts of ownership, and of the manner in which, in some particular cases, these acts are controlled.

It is a general rule of law, that all persons who are not under any legal disability may alienate their property, make leases, and enter into contracts respecting it to the extent of their interest. Thus, tenants in fee may make leases without any restraint as to the time of duration or as to the extent of the power to be conferred, because they have an absolute power of alienation. On the other hand, tenants in tail, for life, for years, from year to year, not restrained by condition or covenant, by elegit, statute merchant or statute staple, or any one possessed of a certain quantity of interest, however small that may be, may make

leases which will be perfectly valid, but which will only endure so long as they themselves might have enjoyed the property.

Such leases cannot be accompanied with any further powers of waste or of general management than the lessors themselves might have exercised. But to this extent every owner for the time being will be permitted to proceed. *Qui facit per alienum facit per se.* Thus, the grantee of a tenant in tail will be dispunishable for waste, and the grantee of a tenant in tail after possibility of issue extinct and of a mere tenant for life will be subject to waste (*a*).

The same authority is also vested in persons who are not seised or possessed in their own absolute right, but who are permitted to exercise it for the benefit of those who are beneficially entitled to the property; as, for instance, trustees, guardians in socage, testamentary guardians, executors and administrators, in respect of terms of years; but all such dispositions will be subject to the same general rule, viz., their duration will be limited to the time the lessors themselves might have continued in possession, and the powers conferred upon the lessees will be co-extensive with those which might have been enjoyed by the lessors (*b*).

By the common law, the *Crown* might have granted leases for lives or for years to any extent, and so as effectually to bind its successors (*c*). But this power of alienation was restrained at the commencement of the reign of Queen Anne.

It was then enacted, that every grant and lease by the Crown of any lands belonging to it (except advowsons) for a longer period than thirty-one years, or three lives, or term of years determinable on one, two or three lives, should be void. The leases are to commence from the date thereof, or if made in reversion or expectancy, then

(*a*) 3 Leon. R. 121; 1 Inst. 28 a.
(*b*) See Chap. IV.
(*c*) Com. Dig. Grant, G. 3.

the same, together with the estate in possession, is not to exceed three lives, or thirty-one years in the whole, and the tenant must be made liable to punishment for waste. There must be reserved to the Crown, its heirs and successors, not less than the rent usually reserved for the greater part of the previous twenty years; and if no rent shall have been payable before, then not less than a third of the clear yearly value of the lands demised (*d*).

It would appear, unopened mines and quarries cannot, under this act, be the subjects of demise.

By the Crown Lands Act, 1866, one-half of the net annual income arising from minerals is to be carried to the capital account, and the residue to the income account. Premiums or fines may also be taken in addition to reserved rents. The management of all Crown foreshores is transferred to the Board of Trade, excepting those of the Thames, the Tees, and the county of Durham. The right to any mines or minerals in or under the foreshores is not affected by the act. But express mining powers are given in respect of the minerals in or under foreshores or any adjoining lands, to those entitled to them under the Crown, on giving two months' notice to the Board of Trade, and on payment of compensation. No works are to be carried on that may be likely to injure any pier or other structure.

By statute 5 & 6 Vict. c. 2, all leases made or to be made by the Prince of Wales, as *Duke of Cornwall*, by letters-patent or indentures under his great or privy seal, are declared to be valid, provided that such leases be made for three lives or fewer, or for thirty-one years or under, or for some term of years determinable upon one, two or three lives, and not above, and that in the case of mines or royalties there be reserved a reasonable rent, payment, toll, due, dole or dish, without any fine.

This act was altered by 11 & 12 Vict. c. 83. Both these acts are now repealed by another act, 26 & 27 Vict.

(*d*) 1 Anne, st. 1, c. 7, s. 5.

c. 49. By the last act, sect. 21, the Duke of Cornwall is enabled, under the seal of the duchy, to demise any manors, lands or hereditaments, including mines and quarries, whether opened or not, with usual powers, for any term not exceeding thirty-one years—and, as to mines, on reserving a reasonable amount of rent, royalty, dues, toll or dish, without fine or premium. The act authorizes exchanges of minerals under inclosure acts (*e*).

By the *Greenwich Hospital* Act, 1865, the lands of the hospital are vested in the Admiralty, with the same powers and provisions as lands vested in it under the Admiralty Lands and Works Act, 1864. But the power of making mining leases is restricted to the term of forty-two years. Every lease must take effect in possession, and the best yearly rent must be reserved that can reasonably be gotten, without fine. There must be a condition of re-entry for non-payment of rent, and a counterpart to be executed by the lessee, who must covenant for payment of the rent—which may be reserved by way of toll, duty, royalty or reservation, by the acre, the ton, or otherwise (*f*).

Civil Corporations, till recently, had also, consistently with their particular bye-laws, an unlimited control over their estates. Their leases were, therefore, binding on their successors (*g*). But it is now enacted by the late Act for the Regulation of Municipal Corporations in England and Wales (*h*), that it shall not be lawful for the Council to demise their lands, except in pursuance of some covenant or agreement entered into before the 5th day of June, 1835, for any term exceeding thirty-one years, and there shall be reserved such clear yearly rent as the Council shall think reasonable, but without taking any fine. But, with the approbation of the Lords Commissioners of the Treasury, or any three of them, the Council may de-

(*e*) See also 23 & 24 Vict. c. 53, as to leases for improvements.

(*f*) 28 & 29 Vict. c. 89, s. 29.

(*g*) Smith *v.* Barret, 1 Sid. 161, 162.

(*h*) 5 & 6 Will. 4, c. 76, s. 94.

mise and alienate the lands upon any terms, and in any manner. Notice of the intention of the Council to apply to the Treasury for any such purpose must be fixed on the outer door of the town hall, or in some public and conspicuous place within the borough, one calendar month at least before the application; and a copy of the memorial intended to be sent to the Treasury must be kept in the Town Clerk's office during the same month, open to the inspection of every burgess.

In all cases where any body corporate shall, on the 5th day of June, 1835, be bound by covenant or agreement, or be enjoined by any deed, will or other document, or be warranted by ancient usage, custom or practice, to *renew leases* for years, or for life or lives, or for years determinable with any life or lives at any fixed, determinate, known or accustomed period, or after the lapse of any number of years, or on the dropping of any life or lives, and years determinable after the lapse of any number of years, at a fine certain, or under any special or specific terms or conditions, and also in all cases in which any body corporate shall theretofore have ordinarily made renewal of any lease for years, or for life or lives, or for years determinable with any life or lives at any fixed, determinate, known or accustomed period, or after the lapse of any number of years, or upon the dropping of any life or lives, upon the payment of an arbitrary fine, it shall be lawful for the Council to renew such lease for such term or number of years, either absolutely, or determinable with any life or lives, or for such life or lives, and at such rent, and upon the payment of such fine or premium, either certain or arbitrary, and with or without any covenant for the future renewal thereof, as such body corporate might have done in case the act had not been passed (*i*).

All leases by corporations aggregate must be made by deed under the common seal (*j*). But if the money be

(*i*) 5 & 6 Will. 4, c. 76, s. 95. (*j*) Kyd on Corporations, 263.

paid, a Court of Equity will decree the execution of an agreement against them (*k*).

It would seem to be the better opinion that *infants* may make leases which will be voidable only on their coming of age, by them, their heirs, or those who may have their estate (*l*). Such leases will, therefore, be confirmed by acceptance of rent (*m*) or an acknowledgment of tenancy (*n*).

Leases by infants, married women, lunatics and persons of unsound mind, are now partially regulated by statute (*o*).

An infant seised of or entitled to lands in fee or in tail, or for an absolute interest, or his guardian, if it appear to the Court of Chancery to be for his benefit that a lease or underlease should be made for encouraging the *working of mines*, or for farming or other purposes, are empowered by the direction of the Court, signified by an order made in a summary way upon petition, to demise lands for such term or terms of years as the Court shall direct. But no fine must be taken, and the best rent must be reserved. The leases must be settled and approved of by a master of the Court, and a counterpart executed by the lessees, to be deposited in the master's office till the infant attain twenty-one (*p*).

Infants and married women, under covenants or agreements to renew leases, or the guardians of infants, by a similar direction of the Court, may accept surrenders of old leases, and make new leases for the periods mentioned in the old leases, or otherwise, as the Court may direct (*q*).

The Lord Chancellor may direct leases for terms of years of the estates of lunatics entitled in fee or in tail, or for absolute interests (*r*).

(*k*) Winne *v.* Bampton, 3 Atk. 475.

(*l*) Ketsey's case, Cro. Jac. 320; Ashfield *v.* Ashfield, Sir W. Jones, 157; Plowd. 418; Perk. s. 12; Co. Litt. 45 b, 308 a; Zouch *d.* Abbot *v.* Parsons, 3 Burr. 1806. See Maddon *d.* Baker *v.* White, 2 T. R. 161.

(*m*) Smith *v.* Low, 1 Atk. 489; Nightingale *v.* Ferrers, 3 P. Wms. 209.

(*n*) Anon., 4 Leon. 4.

(*o*) 1 Will. 4, c. 65.

(*p*) Sect. 17.

(*q*) Sect. 16.

(*r*) Sect. 24.

Similar powers to renew leases are given to the committees of the estates of lunatics; and they are to extend as well to cases where the lunatic shall not be compellable to renew; but it must be for his benefit in cases where he might have been compellable if of sound mind (*s*).

No renewed lease can be executed under the act unless all fines are paid and counterparts executed by the lessees (*t*).

Powers of leasing vested in lunatics, having only a limited estate, may be also executed by their committees under the direction of the Lord Chancellor (*u*).

When lunatics are under contract to let lands, and a specific performance has been directed by the Court, either before or after lunacy, the committees, under the direction of the Lord Chancellor, may convey the land in pursuance of the decree (*v*).

Infants and married women entitled to leases, or the guardians of infants, may apply to the Court of Chancery in England, or to the Courts of Equity of the counties palatine of Chester, Lancaster and Durham, or to the Courts of Great Session in Wales, by petition or motion in a summary way, and such infants or guardians, married women, or person appointed in the place of such infants or married women, may, under the direction of the Courts, *surrender* existing leases, and take *new* leases for the periods and upon the terms mentioned in the old leases, or otherwise, as the Courts shall direct (*w*).

In a case where an infant was seised in fee, defeasible on his death under age without issue, and all persons entitled under the defeasance concurred with him in the petition, the Court ordered the grant of a mining lease (*x*).

The committees of the estates of lunatics may, under

(*s*) Sect. 19.
(*t*) 1 Will. 4, c. 65, s. 20.
(*u*) Sect. 23.
(*v*) Sect. 27.
(*w*) Sect. 12.
(*x*) In re Clark, 35 L. J., Chanc. 314.

the direction of the Lord Chancellor, also surrender leases and take new leases in a similar manner (*y*).

If any persons bound to renew leases are out of the jurisdiction of the Court, the Court may, upon petition, appoint and direct a person to accept surrenders, and make new leases. But the Court may direct a bill to be filed to establish the right of a person seeking the renewal (*z*).

By another act relating to the estates of lunatics, the Lord Chancellor may authorize the committee of the estate to make leases of the mines and quarries, already opened, or unopened, with or without land, for such terms of years and on such terms as he may think proper (*a*).

An agreement was entered into by the committee of a lunatic under the following circumstances. The lunatic was tenant for life, without impeachment of waste, with remainder to his first and other sons in tail, with other remainders over. He was unmarried. Coal was found on the estate, but not in sufficient quantity to justify the sinking of a pit; but the coal might be worked by means of a pit in adjoining land. Part of the estate was mortgaged, and the mortgagee was in possession. The income of the lunatic was much reduced, and there were other debts which could not be satisfied. The committee, therefore, agreed with the owner of the adjoining land to work the coal. The master, who was attended by the next of kin, reported in favour of the proposal. Lord Eldon, on confirming the report, said the circumstances were singular. The next of kin had an interest that the coal should be worked. The heir-at-law had no interest, there being remainders over. It might be done; it was like cutting timber (*b*).

By a recent statute which amends the earlier acts, *in Ireland*, all ecclesiastical persons, and all corporations, colleges, and hospitals, tenants for life with the immediate

(*y*) Sect. 13.
(*z*) Sect. 18.
(*a*) 16 & 17 Vict. c. 70, enlarged by 18 Vict. c. 13.
(*b*) Ex parte Tabbert, 8 Ves. 428. See Oxenden *v.* Compton, 2 Ves. 72.

remainder to their sons in tail male, and tenants in dower or by curtesy, with the consent of the next owner of the inheritance, may grant leases of mines for terms not exceeding forty-one years, in possession, without fine or premium, at the best and most improved rent, in money or in kind, with the usual condition for re-entry on non-payment of rent, and counterparts. The power is also extended to trustees of any freehold estate in any mines, or any estate (other than a lease at rack-rent), for a term not exceeding fifty years unexpired, or determinable on the fall of any life or lives. There is also a power to accept surrenders of existing leases (*c*).

A *mortgagor* has no power to make any leases to bind more than his mere equity of redemption, the legal interest in the lands having been already transferred to the mortgagee. When an estate is discharged from a mortgage, a lease by the mortgagor will be good against himself by estoppel (*d*). If a mortgagor grant a lease subsequently to the mortgage, the mortgagee may evict the lessee without notice (*e*), and maintain an action for mesne profits. This is the only remedy of the mortgagee against the lessee, but the latter is justified in paying rent due at the time of notice to the mortgagee (*f*).

(*c*) 11 Vict. c. 13.

(*d*) Omelaughland *v.* Hood, 1 Rol. Abr. 874, 876.

(*e*) Doe *d.* Roby *v.* Maisey, 8 Barn. & C. 767; 3 Man. & R. 109; Doe *d.* Fisher *v.* Giles, 5 Bing. 421.

(*f*) Pope *v.* Biggs, 9 Barn. & C. 245. See Evans *v.* Elliot, 9 Adol. & Ell. 342. It was decided, in this case, that notice by the mortgagee to the tenant did not constitute a tenancy between them, upon which a distress might be made. Lord Denman, however, expressed himself to be of opinion, that the circumstance of the mortgagee allowing the tenant of the mortgagor to continue in possession might amount to a recognition that the tenant was not a trespasser. The learned judge, it is presumed, only meant that such a tenant could not be evicted without notice, and not that he could avail himself of the entire term granted to him by the mortgagor. This opinion, however, is opposed to the decisions, and cannot, it is submitted, be supported on principle. See Hickman *v.* Machin, 4 Hurl. & N. 716; 28 L. J., Exch. 310.

On the other hand, a *mortgagee*, although the actual owner of the estate at law, cannot, in equity, make a valid lease, unless there exist an absolute necessity for it, and it be made to avoid an apparent loss (*g*). If, therefore, a lease is made without absolute necessity by a mortgagee, it will only endure so long as he is possessed of the legal estate.

The consequence is, that both the mortgagor and mortgagee must, in general, join to make a binding lease. This point is frequently insufficiently attended to in practice, both in mining and other property, and the result may be extremely disastrous to those lessees who have expended money in improvements or speculations (I).

A *copyholder*, unless by special custom or for one year (*h*), cannot make a lease, even by parol, or *in futuro*, without procuring a licence from the lord (*i*), and the licence must be strictly pursued (*k*). But though a lease of mines for years cannot be made without licence, a liberty or licence to work mines, when the right to them belongs to the tenant by special custom (*l*), may be granted without leave from the lord, because no actual estate in

(*g*) Hungerford *v.* Clay, 9 Mod. 1; Lucan *v.* Mertin, 1 Wils. 34.

(*h*) Co. Litt. 58 b; Melwich *v.* Luter, 4 Rep. 26; Foosel *v.* Welsh, Cro. Jac. 403; Matthews *v.* Whelton, Cro. Car. 233.

(*i*) Ever *v.* Aston, Moore, 271; East *v.* Harding, Cro. Eliz. 498; Moore, 392; Lady Montague's case, Cro. Jac. 301; Harding *v.* Turpin, Hetl. 122; Eastcourt *v.* Weeks, 1 Salk. 186; Richards *v.* Sely, 2 Mod. 79; 3 Keb. 638.

(*k*) Com. Dig. Copyhold.

(*l*) Chap. II.

(I) It has frequently been suggested, that in the preparation of mortgage deeds, a power should be reserved to the mortgagor to grant leases of the estate for short periods. The lessees of mortgagors are certainly placed by law in a very unprotected condition. There appears to be no objection to allow the mortgagor to demise for a short term, as for three years. A longer period might form an objection to the security, or to a sale, and might perhaps induce fraud on the part of the mortgagor. Such a power, however, would, after all, form a very insufficient shield of protection to lessees. Their chief security must always depend upon an inquiry into the title of their lessor.

the land is passed, which remains still in the possession of the copyhold tenant. In like manner, a covenant or contract to demise will not create a forfeiture (*m*).

Trustees of charity lands, being possessed of the legal estate, may also make valid leases. But in cases of fraud, or collusion, or general mismanagement, they will be subject to the revision and directions of the Court of Chancery. In the exercise of this power, the trustees must be guided by the general principles of the Court, and exercise a reasonable discretion, and pursue a mode which is beneficial to the charity, in which they will be effectually controlled and directed by the Court (*n*). When the mode of granting leases is prescribed by the founder, the terms of the power must be followed strictly, unless otherwise sanctioned by the Court (*o*). When the power is general, it is superfluous, for it would have been presumed by law.

If trustees act *bonâ fide* in the disposition of the property, the Court will endeavour to protect them from the consequences of mere indiscretion, and especially after a great lapse of time (*p*). Leases will not, in general, be set aside, unless it be shown that the mode of letting is so positively bad that no persons meaning fairly to discharge their trust would have resorted to it (*q*). It is not sufficient to show that leases have been granted for so long a period as ninety-nine years, and at a slight undervalue (*r*).

(*m*) Richards *v.* Sely, supra; Hamlen *v.* Hamlen, 1 Bulst. 189; S. C. Lady Montague's case, Cro. Jac. 301. See Doe *d.* Wood *v.* Morris, 2 Taunt. 52; Fenny *d.* Eastham *v.* Child, 2 Maul. & Sel. 255; Lufkin *v.* Nunn, 11 Ves. 170.

(*n*) Att.-Gen. *v.* Owen, 10 Ves. 555; Att.-Gen. *v.* Brooke, 10 Ves. 326; Att.-Gen. *v.* Wilson, 18 Ves. 518; Att.-Gen. *v.* Hotham, 1 Turner, 209; Att.-Gen. *v.* Green, 6 Ves. 452; Att.-Gen. *v.* Griffith, 13 Ves. 565; Att.-Gen. *v.* Backhouse, 17 Ves. 283; Lydiatt *v.* Foach, 2 Vern. 410; Att.-Gen. *v.* Pargeter, 13 L. J., N. S., C. C. 81; 6 Beav. 150.

(*o*) Watson *v.* Himsworth, Harp. 2 Vern. 596.

(*p*) Att.-Gen. *v.* Warren, 2 Swan. 305.

(*q*) Att.-Gen. *v.* Cross, 3 Mer. 539, per Sir W. Grant. And see Att.-Gen. *v.* Magwood, 18 Ves. 315; Ex parte Birkhampstead Free School, 2 Ves. & B. 134; Att.-Gen. *v.* Hungerford, 8 Bligh, 437.

(*r*) Att.-Gen. *v.* Cross, 3 Mer. 524. And see Att.-Gen. *v.* Moses, 2 Mad. 294.

By a late act, the charity commissioners may authorize the trustees of the charity to grant mining leases on any terms, though these may not be permitted by the original trusts (*s*); and by another later act, the acting trustees, or a majority, not less than three, may grant such leases as they would have power to grant in the due administration of the charity, if the land were legally vested in themselves (*t*).

The lands and property belonging to a *parish* is vested in the churchwardens and overseers of the poor, as a body corporate (*u*). Both the churchwardens and overseers must join to make a valid lease (*x*).

A lease granted by a company established for the preparation and sale of porcelain clay, with the consent of two-thirds of the shareholders, which was required for general acts of proprietorship, was held valid, as a lawful means of turning the assets to the best account, and not *ultra vires* (*y*).

Section II.

LEASES UNDER POWERS.

We may now proceed to consider the rights of those who are enabled to demise for a period beyond the duration of their estate in the lands, or who have no express estate at all.

In all well-drawn settlements and wills, which are designed to confer limited ownerships, as for life or in tail, and which comprise any mines which have been worked, or which may hereafter be considered likely to be worked, it is usual to insert powers to demise the mines, with full

(*s*) 16 & 17 Vict. c. 137, ss 21—26.

(*t*) 18 & 19 Vict. c. 124, s. 16.

(*u*) 59 Geo. 3, c. 12, s. 17.

(*x*) Philips *v.* Pearce, 5 Barn. & C. 433; 8 Dowl. & R. 83; Woodcock *v.* Gibson, 4 Barn. & C. 462.

(*y*) Featherstonhaugh *v.* The Lee Moor Porcelain Clay Company, 1 Law Rep., Eq. 318; 35 L. J., Ch. 84.

liberty to search for and work them. Sometimes there is a power to grant leases of waste lands, with power to dig for clay, gravel and soil, for making bricks or tiles, with a reservation of the other minerals, which are empowered to be demised in the usual way. Recourse was often had to parliament for private acts which may give the proper powers omitted in settlements. A general enabling act has now been passed.

The ordinary power to grant leases for twenty-one years may extend to opened mines, for the mines form part of the lands comprised in the settlement; and it has been expressly held, that they may be demised under a power by the description of manors, lands and tenements (*z*). These powers generally require the lessees not to be made dispunishable for waste—a condition which will prevent a lease of mines which are unopened. If, however, such a condition was not required by the terms of a settlement, and there were no other expressions tantamount to debar a lessee from committing waste, the power would also extend to opened mines.

It frequently happens that under the usual leasing powers for twenty-one years, an exception of the mines is required to be made. Of course this exception should be properly inserted in the lease. In one case, the leases were required to be made, so as the "ancient reservations should be thereby reserved." A point was raised with respect to the mines which were not reserved or excepted in the language of the old leases. The exception was supported by its corresponding with an old lease in substance, though not in the exact words. But it was stated by the Court to be questionable if a lease made between the old and the new leases contained the proper exception. In the former, the exception was all of mines and quarries of stone and slate and all other mines whatsoever. In the latter, it was of all mines of tin, toll tin, tin works, copper, lead,

(*z*) Campbell *v.* Leach, Amb. 748.

and all other mines, minerals and metals whatsoever. Both leases agreed in excepting *all mines*. But the first lease excepted only *quarries* of stone and slate, and the second excepted *all minerals*, so as to include all quarries of all minerals (*a*).

Powers to grant mining leases, of course, vary with the intentions of the parties, and are sometimes imperfectly expressed. A usual form is given at the end of the volume. The power is there extended to the present possessor, and after his death to all persons who may be for the time being entitled to the possession, if such persons are of full age, and if not, to the guardians during their minority.—They are empowered to grant all the mines and quarries within the lands, either opened or unopened, with any land which it may be expedient to demise along with the mines for the advantageous working of them. The term varies considerably, depending both on the nature of the mineral, and the state of the works; but in the form here referred to, it is for sixty-one years. The power is to authorize full liberty to work the mines, to sink shafts, erect furnaces, engines, workmen's houses, and other buildings, and to use all other lawful means, as well for finding and getting the minerals as for effectually washing and separating them from the soil or other substances; to cleanse the mines from water, and supply them with pure air; to use sufficient room on the surface for placing or heaping the minerals, earth and rubbish; and also, full liberty to erect smelting mills and furnaces for reducing and refining any of the metallic ores; to make and use all sufficient and usual ways, railroads and other roads for taking away the produce of the mines, and generally to make use of all such means as are usual and proper in similar cases, for effectually carrying on the adventure. The conditions to be observed in granting such a lease are, that the best or most approved yearly rents, tolls or

(*a*) Doe *d.* Douglas *v.* Lock, 1 Ad. & Ell. 705.

duties that can be reasonably obtained should be reserved in it, without fine ; that there be contained a power of re-entry on nonpayment of the rent or nonperformance of the conditions on the part of the lessees; that counterparts shall be executed by the lessees, and that they shall enter into covenants and agreements for payment of the rent, and for the proper working and management of the mines, works and property.

It has been remarked before, that the full liberty to work mines will be incident to a demise of mines, and that, in fact, all the necessary rights and privileges, which are fairly required for a lessee to avail himself of the grant, will be presumed by law. The same principle will apply to the creation of a power. But, in the above instance, it will be seen that the power to lease mentions many rights which would not be incident to such a grant, and which are not strictly necessary for giving effect to it. Now, in all such cases, it is of great importance to see that the original power is not defective in withholding any of the additional privileges which may reasonably be required by lessees. If there is no source, there can be no stream; and a lessor may thus be precluded from giving to his lessees privileges, the exercise of which might confer an equal benefit upon both, and without which the mines might perhaps lie dormant till the whole property should become unfettered from the chains of a defective and disastrous settlement. Express provision should, therefore, in most cases, be made for the exercise of those rights which may not be presumed by law, and which the particular exigences of the adventure may demand. It may often, for instance, be highly advisable to give extraordinary powers with respect to the manufacture, smelting or final preparation of the article for the common market. The donee of the power will still be at liberty to exercise his discretion whether he will pursue the power to its full extent, and avail himself of his entire authority. Of course, there are frequent occasions where it may be im-

prudent, not only for the lessor to exhaust his whole power, but for the donors to authorize any particular acts.

Lands were devised to trustees, in trust to pay rents to C. for life, but subject to waste, "for digging or getting any coal opened or to be opened otherwise than under the power thereinafter given," with remainder to D. for life, and other remainders over. The power authorized the person or persons (except C.), who, by virtue of the limitations, should, for the time being, be seised of or entitled to the actual freehold of the premises, or to the rents thereof, to grant leases of the mines. It was held, that the trustees, who had the legal estate during C.'s life, could, during his life, grant leases of the coal mines (*b*).

When mining leases are granted under powers, it will be readily seen that it is of great consequence to attend to their proper execution. It would be inconsistent with the object of this work to enter into the general law concerning the execution of powers (*c*). But it will be proper to discuss several subjects connected with our immediate purpose. I. What may be demised. II. For what term. III. Leases in reversion and by way of future interest. IV. The rent. V. The covenants and conditions to be observed.

I. It should be seen that the power certainly extends to the hereditaments proposed to be demised; as, for instance, to unopened mines, if the mines are not expressly mentioned. Sometimes the power is restricted to lands *usually letten or commonly letten*. It has not been decided what precise period will answer this description; but it has been held, that land not demised within twenty years was not within such a power (*d*), and it is probable that that period may be fixed as the limit, as, we shall afterwards see, it has been fixed for the same purpose by the enabling

(*b*) Leigh *v.* Earl of Balcarras, 6 Com. B. Rep. 849.

(*c*) See Sugden on Powers, and B. Chance on Powers.

(*d*) Tristram *v.* Lady Baltinglass, 2 Jo. 27; Vaugh. 28; 1 Freem. 23.

statute of Henry. One letting will be sufficient (*e*), and it may have been by deed, or by parol, and not only for years, but from year to year, or at will (*f*). A covenant to stand seised has been held to be a sufficient letting (*g*).

When there is a general power to lease lands, and the reservation of rent is directed to be made with reference to the amount obtained in previous lettings, it has been held, that the power may be exercised with respect to lands which have not been let at all within the period, and with the reservation of any amount of rent (*h*). The rule is thus expressed by Lord Holt:—If a man hath a power reserved to him of making leases of two things, and a qualification is annexed to the power which cannot extend to one of these things, he may make a lease of that thing without any regard to the qualification (*i*).

This rule, however, is not applicable when the nature of the property would seem to imply the intention of the parties not to authorize a lease. Thus, a mansion house (*k*), tithes always held by the possessor of the estate (*l*), have been decided not to be within such a power. No decision has taken place with respect to mines (*m*). If an express power to demise mines direct the lessee not to be made dispunishable for waste, the condition will be repugnant and void, and the power may be exercised with respect to all mines as well unopened as opened (*n*). But in a case of a lease of land, containing open mines, the mines were not mentioned at all in the power, either opened or un-

(*e*) Vaugh. 28; T. Jones, 27.

(*f*) Co. Litt. 44 b; Dean and Chapter of Worcester's case, 6 Rep. 37; Baugh *v.* Haynes, Cro. Jac. 76.

(*g*) Right *d.* Basset *v.* Thomas, Bl. Rep. 446; Burr. 1441.

(*h*) Comberford's case, 1 Rol. Abr. 262, l. 6; Wakeman *v.* Walker, 1 Freem. 413; 1 Ventr. 294; 2 Lev. 150; 3 Keb. 544, 595; Goodtitle *d.* Clarges *v.* Funucan, Doug. 565.

(*i*) Winter *v.* Loveday, Com. Rep. 36, 40; Carth. 427; Lord Raym. 261; Freem. 507; 2 Salk. 537.

(*k*) Bagot *v.* Oughton, Fort. 332; 8 Mod. 249.

(*l*) Pomery *v.* Partington, 3 T. R. 665.

(*m*) See end of this section.

(*n*) Campbell *v.* Leach, Amb. 748; Daly *v.* Beckett, 24 Beav. 114. See remarks on this case, in Clegg *v.* Rowland, infra.

opened, and were only mentioned among the general words previously contained in the parcels of the settlement, it was held, that the condition, that no lessee should be made dispunishable for waste, was not deprived of its effect—inasmuch as such a power, like a lease of land containing only open mines, could not authorize the working of unopened mines, but would only operate on the mines that had been opened (*o*).

The ordinary power to lease the surface will not authorize the demise of a way-leave (*p*).

It has been held, that a lease under a power may authorize the grant of a right of out-stroke, or licence for working the coal of other owners (*q*).

A power in a settlement authorized a lease of coal mines, with all such powers, authorities, accommodations, liberties and privileges as should be *necessary, or were usually contained in leases of collieries or mines* in the county, place or neighbourhood where the mines demised were situate, for seeking, mining, working, drawing, taking and carrying away the coals. A lease of coal, under the power, authorized the lessees to seek for and work the coal, and also to build and set up all such engine-houses, machine offices, workshops, *workmen's cottages*, stables, buildings and accommodations as should be *bonâ fide* necessary or proper for the due prosecution of the works and premises, with liberty to dig and use stones, slates and brick-earth and materials required for the collieries, buildings and works. The lessees built several workmen's cottages on the estate for the miners. In an action of ejectment brought against the lessees, it was contended, that the lease was not a due execution of the power. The jury found that the power to build cottages in convenient

(*o*) Clegg *v.* Rowland, 35 L. J., Ch. 396.

(*p*) Ricketts *v.* Bell, 1 De G. & S. 335.

(*q*) Jegon *v.* Vivian, 1 Law Rep., C. P. 9; 35 L. J., C. P. 73; (per Erle, C. J.)

places was necessary and usual. It was held by the Court of Exchequer, that the lease was not absolutely void, but that it depended on the questions which had been found by the jury, and was therefore valid. This decision was confirmed, on appeal (*r*).

Any royalty reserved by a lease under a power, even if consisting of part of the produce of the mine, will be considered as rent, and not as *corpus*, and may be received by a tenant for life (*s*).

In a settlement of personal property, it was covenanted to settle all future property on the same trusts, and subject to the same powers, or as near thereto as the nature and tenure of the property would admit. Freehold property afterwards became subject to the covenant. The prior owner had granted mining leases; but the mines had never been effectually worked under them. It was held, that a power to grant mining leases should be inserted in the new settlement (*t*).

If the demesnes of a manor are excepted in a leasing power, copyholds will be within the exception; and it was held, with apparent reason, by one Judge, that even if demesne lands had not been expressly excepted, the power would not have extended to copyholds, without the express words of the parties, because the tenure would be destroyed, and the lands disfranchised, by the exercise of the power (*u*).

II. The demise must not exceed the term marked out for its limit.

A power to lease for lives will not authorize a lease for years determinable upon lives. But if the power express that a lease shall not exceed three lives or twenty-one

(*r*) Morris *v.* The Rhydydefed Colliery Co., 3 Hurl. & N. 885; 27 L. J., Exch. 480: 28 Ibid. 119. See Pearse *v.* Baron, Jac. 158.

(*s*) Daly *v.* Beckett, 24 Beav. 114.

(*t*) Scott *v.* Stewart, 27 Beav. 367.

(*u*) Winter *v.* Loveday, Carth. 428, per Rokeby, J.

years, a lease for any term of years determinable upon not more than three lives will be supported (*x*). On the other hand, a power to lease for any period, not exceeding twenty-one years, or for lives, not exceeding three, will authorize a lease, either for years or for lives, but not a lease for years determinable upon lives; for the former part of the clause is express that the lease shall not exceed twenty-one years (*y*). Clauses of this kind are generally construed in distinct parts of a sentence, so as to authorize the creation of several terms. For instance, the expressions, "or for thirty years, or for any other number of years determinable upon three lives," will authorize powers to lease for thirty years absolutely, or for any other term determinable upon lives (*z*).

A power to lease for twenty-one years would, if exercised, create a term which could not be rendered void; but if it be for any term not exceeding twenty-one years, the term may be made to cease at the option of the lessor (*a*).

It has now been decided that, by a lease under a power not to exceed a certain number of years in the creation of the term, the lessee may be made to elect to put an end to the tenancy (*b*).

The construction of a power will be determined according to the intention of the parties; and a power may be either enlarged or restrained by the context (*c*). A power may be restrained to any extent, compatible with the general rules of law, and its exercise may be incumbered

(*x*) Whitlock's case, 8 Rep. 69 b. 1 Brownl. 169; Rattle *v.* Popham, Str. 992; Cunn. 102; Churchman *v.* Harvey, Amb. 335.

(*y*) Roe *v.* Prideaux, 10 East, 158.

(*z*) See Winter *v.* Loveday, 1 Com. 37; Lutwich *v.* Piggot, 3 Mod. 268.

(*a*) Cardigan (Earl) *v.* Montague, Reg. Lib. A. 1754, fol. 406. See Sug. on Powers, Appendix, No. 14.

(*b*) Muskerry *v.* Chinnery, Lloyd & Goold, Rep. temp. Sug. 185; 7 Cla. & Fin. 1; Macl. & Rob. 493; 2 Jebb & S. 300; Sugd. Treat. H. of L. 472.

(*c*) Talbot *v.* Tipper, Skin. 427; Muskerry *v.* Chinnery, supra.

with many formalities; but unless it is restrained by a sound construction of the whole instrument, it may be unlimited; for *cujus est dare, ejus est disponere* (*d*).

The donee of a power to lease for a certain number of lives or years, may always exercise the power for a shorter period; that is, he may create a less interest of the same nature than what might be warranted by the authority; as if the power be for three lives, he may lease for two lives, or if for twenty-one years, he may demise for ten years (*e*).

A lease which exceeds the term authorized by the power will be void at law (*f*). But it will be supported in equity for so much as is warranted by the power (*g*).

In a will, which limited an estate in strict settlement, there was a power for a tenant for life "to work or contract for, lease or let out to be worked," all the coal and other minerals. The tenant for life was directed to apply all the profits to the payment of the testator's debts, and lay out the residue in the purchase of estates to be settled to the same uses. A lease of mines for sixty years was granted under this power, and the tenant for life died soon afterwards. The Court of Common Pleas was equally divided on the question, whether the power authorized a lease for an unlimited term, in a fiduciary sense, or only for the life of the tenant for life (*h*).

The case is under appeal.

III. Powers of leasing are generally so framed as to exclude the grant of a lease in reversion or by way of future interest; but it occasionally happens that the intention of the settlor may contemplate the creation of a

(*d*) Mountjoy's case, 5 Rep. 3 b; Att.-Gen. *v.* Moses, 2 Madd. 294, and cases last cited.

(*e*) Carter *v.* Claycole, 1 Leon. 308; Bridg. by Ban. 91, 603; Isherwood *v.* Oldknow, 3 Maul. & Sel. 382; Cardigan *v.* Montague, supra.

(*f*) Roe *v.* Prideaux, 10 East, 158.

(*g*) Parry *v.* Bowen, 3 Chan. Rep. 6; Pitt *v.* Jackson, 2 Bro. 54; Campbell *v.* Leach, Amb. 740; Alexander *v.* Alexander, 2 Ves. 645.

(*h*) Jegon *v.* Vivian, 35 L. J., C. P. 73; 1 Law Rep., C. P. 9.

reversionary interest as well as of an interest in immediate possession.

A lease is said to be *in futuro*, or by way of future interest, when it is made to commence at a future day, and without reference to any subsisting interest. It is said to be granted in reversion, or in remainder, when it is to begin after the regular determination of a prior interest; and a lease which is made to run during the existence of a subsisting interest, but which confer no present possession till the determination of the former one, is called a *concurrent* lease. A lease by way of future interest for years will thus be concurrent with respect to the time included both in it and the subsisting lease, and it will be in reversion with respect to the time embraced by it after the expiration of the former interest. But as a lease for life confers a freehold estate, and cannot, therefore, be granted by way of future interest, it can necessarily take effect only as a concurrent lease, and must have a present commencement. If the prior lease be for years, another lease for life may be granted immediately, but with the possession postponed; but if the prior lease be for life, no other lease for life can be granted till the first lease is determined (*i*); yet a lease for years determinable upon lives may be granted (*k*).

A concurrent chattel lease is good, if the inheritance is not charged in the whole with a larger term than is authorized by the power (*l*).

A general power of leasing for a certain number of years, without expressly particularizing leases in possession or reversion, will only enable the grantor of the power to grant a lease in possession (*m*). If the power is expressly to lease in possession, a lease in reversion will be excluded

(*i*) Roe *v.* Prideaux, 10 East, 184.
(*k*) Whitlock's case, 8 Rep. 70 b.
(*l*) Read *v.* Nash, 1 Leon. 147.
(*m*) Lady Sussex *v.* Wroth, Cro. Eliz. 5; 1 Leo. 35, nom. Leaper *v.* Wroth; Sheecomb *v.* Hawkins, Cro. Jac. 318; Yelv. 222; 1 Brownl. 148; Berry *v.* White, Bridg. by Ban. 82.

by implication, although the lands be already in lease (*n*). But a general power to demise land in lease at the time of the settlement will authorize a lease in reversion, if such an extension can plainly be implied from the language of the settlement; as, for instance, from the apparent intention that lives should be filled up as they dropped (*o*), or that the term within which the power is restricted is to be reckoned from the time of making the demise (*p*); or if the land be in lease already, and there is only a reversion in the person creating the power (*q*).

A person cannot make leases of the same land, both in possession and in reversion, under a power to lease in reversion as well as in possession; for the power will be confined to such land as was not then in possession (*r*). Neither will such a power to lease lands already leased authorize repeated leases in reversion, unless the intention is perfectly clear (*s*).

If a lease is to be granted in possession, a lease *in futuro* is absolutely void (*t*); and if it be made to begin a single day after the date of the deed creating it, it is, both at law and in equity, as fatal a variance as if made to begin after a hundred years (*u*). But, notwithstanding the earlier authorities, a lease under such a power may begin from "the day of the date" (*x*). But the usual expression of "from the day next before the day of the date," should not be departed from.

A lease will take effect from the time of its execution,

(*n*) Opy *v.* Thomasius, 1 Lev. 167; Raym. 132; 1 Keb. 778, 910; 1 Sid. 261; Doe *d.* Sutton *v.* Harvey, 1 Barn. & C. 426.

(*o*) Coventry *v.* Coventry, 1 Com. 312.

(*p*) Ibid.; Marquis of Northampton's case, Dyer, 357 a; 1 Rol. Abr. 261, l. 15.

(*q*) Harcourt *v.* Pole, 1 And. 273. See Shaw *v.* Summers, 3 Moore, 196.

(*r*) Winter *v.* Loveday, 1 Com. 36, per Holt.

(*s*) Bridg. by Ban. 101.

(*t*) Pollard *v.* Greenvil, 1 Chan. Cas. 10; 1 Chan. Rep. 185; Doe *v.* Calvert, 2 East, 375.

(*u*) Bowes *v.* E. L. Waterworks, Jac. 374. See Relief Act, infra.

(*x*) Pugh *v.* Duke of Leeds, Cowp. 714.

and not from its date. The latter may certainly be evidence of the execution, but if it can be shown that the deed was executed within the terms of the power, it will be supported, notwithstanding the incongruity of date (*y*).

If a new lease be made to the person in possession under an old lease, it will operate as a surrender in law of the old lease, even if the latter lease is concealed, and is not referred to (*z*). But this operation will not be produced, if the same lease does not pass all the interest it purports to pass, or at any rate such an interest as does not exceed that already in existence (*a*).

It will appear in the next section, that under the statute of 1 Eliz. c. 19, archbishops and bishops may make concurrent leases to take effect in possession. But the better opinion seems to be that the same latitude cannot be extended to the execution of powers in private settlements (*b*) without express authority.

IV. The power must also be pursued with respect to the amount of rent and the mode of reservation. If the taking of fines on renewal be authorized, the fines will be considered as part of the annual profit. But in English settlements, the taking of a fine or premium is usually prohibited, and the property directed to be let for the best rent; what will be considered to amount to the best rent, or to rack-rent, or any proportion, will be a question of fact for the decision of a jury; and the best rack-rent is that which the landlord can acquire consistently with securing to the estate a substantial and beneficial tenant (*c*).

In such cases the receipt of a fine will be fatal to the

(*y*) Campbell *v.* Leach, Amb. 740; Doe *v.* Day, 10 East, 427; Doe *v.* Robson, 15 East, 32. See Pollard *v.* Greenvil, 1 Chan. Cas. 10.

(*z*) Wilson *v.* Sewell, 1 Black. 617; Gumbrell *v.* Roper, 3 Barn. & Ald. 711.

(*a*) Sug. on Powers, vol. ii. p. 392.

(*b*) See Sug. on Powers, vol. ii. p. 402. and the cases there cited.

(*c*) Wright *v.* Smith, 5 Esp. 203; Doe *d.* Lawton *v.* Radcliffe, 10 East, 278; Doe *d.* Rogers *v.* Rogers, 5 Barn. & Ad. 755; 2 Nev. & M. 550; Campbell *v.* Leach, Amb. 740.

lease (*d*); but the circumstance of the tenant being willing to make improvements will not vitiate the lease, unless collusion or a fraud upon the power can be shown (*e*). Improvements by a tenant will not authorize a lease at an undervalue (*f*).

The receipt of fines, may, however, be expressly authorized by the settlement, in which case the Court will determine the proper construction of the power (*g*).

The reservation of the best rent is intended for the protection of the reversioner; but it would seem that the best rent must also be reserved to the grantor (*h*).

In a power to grant building leases, the best rent must be understood to be calculated with reference to the sum to be laid out by the tenant in improvements, and due allowance should be made for the repairs to be made by the tenant (*i*). Similar principles appear to be also applicable to mines.

In old powers, the rent was often directed to be the ancient, or accustomed or usual rent. In such cases, the rent payable at the time of the creation of the power, or the last rent, will be the amount of reservation, which must not be diminished, though it may of course be increased (*k*). A fine may be taken, if such a mode has been sanctioned by invariable custom (*l*).

The rent need not be payable in money; and, accord-

(*d*) Shannon *v.* Bradstreet, 1 Scho. & Lef. 52; Doe *v.* Rogers, supra; Doe *v.* Radcliffe, supra.

(*e*) Shannon *v.* Bradstreet, supra.

(*f*) Roe *d.* Bulkeley *v.* Archbishop of York, 6 East, 86; Doe *d.* Griffiths *v.* Lloyd, 3 Esp. 78.

(*g*) Muskerry *v.* Chinnery, Rep. temp. Sug. 185; 1 Rep. temp. Plunk. 195; 7 Cl. & F. 1; Macl. & Rob. 493; 2 Jebb & S. 300; Sugd. Treat. H. of L. 470.

(*h*) Mountjoy's case, 5 Rep. 6 a, 6 b.

(*i*) Doe *v.* Bettison, 12 East, 308, 309, per Le Blanc, J.; Shannon *v.* Bradstreet, 1 Scho. & Lef. 52.

(*k*) Morrice *v.* Antrobus, Hard. 325; 3 Chanc. Rep. 66, 68, 78; Doe *v.* Creed, 4 Maul. & Sel. 371.

(*l*) Right *d.* Basset *v.* Thomas, Burr. 1441; Black. 446; Doe *d.* Newnham *v.* Creed, 4 Maul. & Sel. 371.

ingly, upon a lease of mines, a proportion of the produce may be reserved (*m*).

The reservation of rent must be stated with certainty for the information of those in remainder (*n*). But it does not follow that the precise sum should be stated. *Id certum est quod reddi potest certum.* Thus, a sum varying with the amount of minerals raised, or a variable quantity of the minerals themselves, will be sufficient (*o*). But under a power to reserve the accustomed rent, one kind of rents cannot be substituted for another (*p*).

With respect to the mode of reservation, the same compliance with the terms of the power must also be observed.

When the usual and accustomed rent was required, it was once considered that lands not usually let together could not be joined, with a reservation of the same rent, and that, *vice versâ*, lands usually so let could not be severed in demises with a proportionable rent for each. The latter question has been set at rest by the case of Doe *d.* Shrewsbury *v.* Wilson (*q*), which decided in favour of the separation; and there seems to be no good reason for supposing that a contrary principle of decision, if occasion should call for it, would be applied to the former question (I).

(*m*) Campbell *v.* Leach, Amb. 740; Bassett's case, cited ibid. 748.

(*n*) Orby *v.* Mohun, 3 Chan. Rep. 56; 2 Freem. 291; 2 Vern. 531, 542, affirmed Dom. Proc. 3 Br. Parl. Cas. nom. Duchess of Hamilton *v.* Mordaunt, 248.

(*o*) Lewson *v.* Piggot, cited 3 Chan. Rep. 61.

(*p*) Mountjoy's case, 5 Rep. 5; Moore, 197.

(*q*) 5 Barn. & Ald. 363.

(I) It was observed by Lord Tenterden, in the case just cited, that the doubts as to separate leases of ecclesiastical lands had been terminated by statute; but that it was not necessary to infer from thence that those doubts were well founded. Independently of authority, he thought that that which was for the benefit of the estate might lawfully be done. See Co. Litt. 44 b; Smith *v.* Trinder, Cro. Car. 22; Doe *d.* Douglas *v.* Lock, 1 Ad. & Ell. 725.

A rent to be made payable yearly will be well reserved if the rent is to be paid on the usual rent days (*r*).

Several demises may be comprised in one deed, but the reservations must be kept distinct (*s*); and when different lands are thus demised under separate powers which are to be executed with different formalities, much embarrassment may be occasioned in determining the validity of the lease.

In one case, opened and unopened mines were demised by one deed, reserving a certain proportion of the mineral produced. It was held, at the Rolls, that the power did not extend to the unopened mines, and that, therefore, the whole lease was void. But upon the appeal it was held otherwise. For the two objects were separable, and the rent for each mine was ascertainable without relation to the other. The demise, therefore, at any rate, was valid, in this respect, as to the opened mines (*t*).

It has frequently been decided, that if one entire rent is reserved for distinct lands which are not both within a power, and which, consequently, require to be ascertained and separately valued, the lease cannot be supported (*u*). In such cases, where the ancient rent is required, and the amount is reserved as an entire rent, even if the other lands are included in the same power, the lease is bad, both because it tends to destroy the evidence of the ancient rent, and because upon an apportionment the ancient rent would not be payable for the land anciently let (*x*). It is quite clear, that if there be distinct reservations of the

(*r*) 5 Barn. & Ald. 363; R. *v.* Weston, Lord Raym. 1198; Campbell *v.* Leach, supra.

(*s*) Doe *v.* Rendle, 3 Maul. & Sel. 99; Doe *d.* Williams *v.* Matthews, 2 Nev. & M. 264; Doe *d.* Earl of Egremont *v.* Stephens, 6 Q. B. 208; 13 L. J., N. S., Q. B. 350.

(*t*) Campbell *v.* Leach, Amb. 740.

(*u*) Earl of Cardigan *v.* Montague, Reg. Lib. A. 1754, fol. 406, reported in Sug. on Powers, Appendix, No. 14; Doe *v.* Lloyd, 3 Esp. Ca. 78; Doe *d.* Douglas *v.* Lock, 1 Ad. & Ell. 705.

(*x*) Coxe *v.* Day, 13 East, 118; Doe *v.* Rendle, 3 Maul. & Sel. 99; Doe *v.* Matthews, 5 Barn. & Ad. 298.

several sums in respect of the different lands, none of the preceding objections can be urged (*y*).

V. It has been seen, that in powers to grant mining leases, it is usually required that the lessee should covenant for the payment of the rent; that a clause be inserted for re-entry in default of payment, or on breach of any of the covenants on the part of the lessee, and that he execute a counterpart of the lease. If any of these conditions are not complied with in the framing of the lease, it will be void.

The number of days, during which, the rent being unpaid, a power of re-entry is given, is usually mentioned. But if it is not, it has been decided in a great case, in the House of Lords, assisted by all the judges, reversing the judgment of the Exchequer Chamber, that a reasonable time and circumstances may be introduced into the clause in the lease—as, in that case, fifteen days, and no sufficient distress,—and if a greater length of time be expressed in the power, this will not prevent the introduction of a reasonable qualification, as want of sufficient distress (*z*). The words, "after reasonable demand," may also be inserted (*a*). In a late case, forty-two days were allowed, in the absence of any specified period (*b*). If the clause in an ordinary power for twenty-one years, not expressly embracing mines, should direct that the lessee be not made dispunishable for waste, it has been seen, that the lease cannot authorize the working of unopened mines, but only of opened mines (*c*); but if the mines be expressly mentioned in the power, it will, it seems, be held to extend to all mines,

(*y*) See Doe *v.* Rendle, supra.

(*z*) Doe *d.* Earl of Jersey *v.* Smith, 7 Price, 281; 2 Brod. & Bing. 473; 5 Maul. & Sel. 467; 3 Bligh, 290; Hotley *v.* Scott, Lofft, 316; Lord Tankerville *v.* Wingfield, 2 Brod. & Bing. 498; 7 Price, 343; 3 Bligh, 331, n.; 5 Moore, 346.

(*a*) Doe *v.* Wilson, 5 Barn. & Ald. 363.

(*b*) Doe *d.* Wythe *v.* Rutland, 2 Mee. & Wels. 661.

(*c*) Campbell *v.* Leach, Amb. 740.

and the words prohibiting waste will be considered repugnant and void (*d*).

When a counterpart is required, the lessee should obtain a memorandum of its execution, and delivery to the lessor, to be indorsed on the lease, and signed by the lessor (*e*).

In the case of the Earl of Cardigan *v.* Montague (*f*), there was a power to lease iron works mentioned in a certain deed, for such term, and under such rents, covenants, and agreements as were therein contained, or to any person for any term not exceeding thirty-one years, so as upon every such lease there be reserved such rents or payments, or more, as by the said deed was mentioned and agreed to be reserved. Proper rents and payments were reserved in the lease, but there was an omission of important covenants for repairing and other purposes, which were contained in the deed referred to. The lease was, therefore, declared to be void.

In such cases, the lease must not contain any unusual covenant on the part of the lessor, as, for instance, a covenant to rebuild in case of fire, or the lease will be void both at law and in equity (*g*). But such a lease is only void when it purports to bind the reversion to the performance of an improper covenant. The particular donee may, of course, bind himself by such a covenant, without avoiding the lease (*h*).

All such usual covenants must be expressly inserted in the lease, and cannot be included in a general reference to the words of the deed (*i*).

It now remains to be seen, in what cases the defective execution of powers of leasing will be aided by a Court of Equity; for such powers are not held to receive a stricter construction than other powers.

(*d*) See supra; Winter *v.* Loveday, Com. Rep. 36, 40; Carth. 427; Lord Raym. 261; Freem. 507; 2 Salk. 537.

(*e*) See Sug. on Powers, vol. ii. p. 466.

(*f*) Supra.

(*g*) Doe *v.* Sandham, 1 T. R. 705.

(*h*) Doe *v.* Bettison, 12 East, 305.

(*i*) 3 Chan. Rep. 76.

A lessee is *pro tanto* considered to be a purchaser, and relievable on the ground of a meritorious consideration (*k*).

An agreement to execute a power, if the intention is sufficiently apparent, and reduced into writing, will be, in equity, binding upon those in remainder, who will be ordered to execute a formal lease; and this intention may be expressed either by an instrument *attempting* to execute the power, or by a covenant to execute it, or by a will desiring the remainder-man to create the estate, or by a contract not under seal, or by letters.

In a case of mines, already cited, the power authorized a lease for twenty-one years. A lease of lead mines was granted, in 1743, for that period. The lessor warmly encouraged the prosecution of the works, and granted another lease of the same mines to the same lessee in March, 1759, for *twenty-six years*, with a reservation of one-eighth of the produce. The lessee and a copartner expended upwards of 33,000*l.* upon the faith of the renewed lease. A bill was afterwards filed on the part of the remainder-man, for setting aside the last lease, as contrary to the power. The plaintiffs recovered the mine in an action of ejectment; but a bill was filed by the lessee to have the benefit of the lease, as far as it could be warranted by the powers. It was decided by Lord Chancellor Apsley, assisted by Grey, C. J., and Smythe, C. B., that, though the lease was bad in law, and the former lease was not actually surrendered, yet the new lease should be executed in equity. It must be understood that the parties meant to execute it legally. The lessees had laid out many sums in levels, and erecting smelting mills, and it would be monstrous not to give relief. Under a power of leasing, there is a referable priority given by settlement, and a tenant for life had a qualified power of contracting to bind the remainder-man (*l*).

(*k*) Reid *v.* Shergold, 10 Ves. 370.

(*l*) Campbell *v.* Leach, Amb. 740; Sug. Powers, Appendix, No. 26.

But a defective execution, without any contract to execute a power, will not be aided against the person who made it, though it will bind those in remainder (*m*).

A parol contract will not bind the remainder-man, although it is in part performed by the intended lessor (*n*), unless the lessee is suffered to improve the estate (*o*).

When the power is attempted to be exercised by a formal instrument, which proves to be defective, the execution will be equally relievable—as, when three witnesses are required, and two only attest; or it is not otherwise executed conformably to the power (*p*).

But if the best rent is not reserved by a lease, or a fine is paid, or the lease is made to begin in futuro, or if the interests of the remainder-man are in any manner prejudiced, and all these acts are at variance with the terms of the power, a Court of Equity will not relieve in cases of contract (*q*).

When a lease, purporting to be made under a power, is void for an insufficient execution, the acceptance of rent by the remainder-man will not operate as a confirmation, but, at most, only as an acknowledgment of a subsisting tenancy from year to year (*r*).

An important act has been passed for granting relief against defects in leases under powers. When a lease under any power is invalid by the non-observance or omission of some condition or restriction, or from any other deviation from the terms of the power, and the lessee has entered, such a lease shall be considered in equity as a contract for a grant, at the request of the lessee, of a valid lease under the power, except so far as

(*m*) Coventry *v.* Coventry, 2 P. Wms. 222; 1 Str. 596; Sargeson *v.* Sealey, 2 Atk. 412; Vernon *v.* Vernon, Amb. 1; Shannon *v.* Bradstreet, 1 Rep. temp. Redesdale, 52.

(*n*) Blore *v.* Sutton, 3 Mer. 237.

(*o*) Stiles *v.* Cowper, 3 Atk. 692, and last case; Symons *v.* Symons, 6 Madd. 207.

(*p*) Parker *v.* Parker, Gilb. Eq. Rep. 168; Cotter *v.* Layer, 2 P. Wms. 623; Doe *v.* Weller, 7 T. R. 478.

(*q*) Campbell *v.* Leach, supra.

(*r*) 6 Geo. 4, c. 16, s. 77; 7 Geo. 4, c. 57.

any variation may be necessary under the terms of the power, and all persons who would have been bound by a lease lawfully granted shall be bound by such contract. But no lessee shall be entitled to the variation if the persons bound by the contract are willing to confirm it without variation. When a lease is invalid by reason that at the time the person granting it could not lawfully grant such a lease, and the estate of the grantor shall have continued after the time when such or the like lease might have been granted under the power, the lease shall take effect and be as valid as if it had been granted at such last-mentioned time. When a valid power of leasing is vested in any person granting a lease, and the lease (by reason of the determination of the estate of such person or otherwise) cannot have effect and continuance, independently of the power, the lease shall be deemed to be granted in the intended exercise of the power, although the power be not referred to in the lease. The act is not to prejudice the rights of lessees under covenants for title or quiet enjoyment, nor the rights of the lessor in respect of any breach of covenants on the part of the lessee. The act does not extend to any lease by ecclesiastical persons, or to any possessions of any college, hospital or charitable foundation, or to any lease surrendered or recovered against by reason of invalidity, or where there has been any judgment or decree relating to its validity (*s*).

By an amending act, it is declared that, on or before the acceptance of rent under any invalid lease, if any receipt, memorandum or note in writing confirming the lease is signed by the person accepting the rent, or his agent, the acceptance shall be deemed to be a confirmation as against the person accepting. Where, during the continuance of possession under any invalid lease, the person entitled to the hereditaments is able to confirm it without variation, the lessee is bound, at the request of such person, to ac-

(*s*) 12 & 13 Vict. c. 26.

cept such a confirmation, which may be effected by memorandum or note in writing signed by the persons confirming and accepting, or their agents (*t*).

Neither of these acts appear to extend to mere contracts, but only to actual or attempted leases, which are declared to amount to contracts.

Assignees of bankrupt and insolvent estates may grant leases under powers limited to the bankrupt or insolvent for the benefit of the estate (*u*).

Powers vested in infants, lunatics, and married women, have already been mentioned (*v*).

Large powers of leasing settled estates are now given to the Court of Chancery, both in England and in Ireland, by an act, 19 & 20 Vict. c. 120, with due regard for the interests of all parties entitled under the settlement, but without regard to waste. The term of forty years may be granted for a lease of mines, or water, wayleaves, and other rights or easements. Every lease must reserve the best rent that can be reasonably got, to be made payable half-yearly or oftener, without fine or premium. In a lease of "earth, coal, stone, or mineral," a certain part of the rent must be invested as part of the settled estate, viz., one-fourth when the person in possession is entitled to work mines for his own benefit, and in other cases three-fourths. The Court may direct the insertion of any special or other covenants. The act authorizes leases, either of the whole or any parts of the settled estates, surrenders of leases, and new leases. There are rules for proceeding under the act, and as to evidence, consents and notices.

By sect. 32, tenants for life in possession, either in their own right or *jure uxoris*, unless the settlement ex-

(*t*) 13 Vict. c. 17.

(*u*) Jones *d.* Cowper *v.* Verney, Willis, 169; Doe *d.* Martin *v.* Watts, 7 T. R. 83; Doe *d.* Brune *v.* Prideaux, 10 East, 158; Doe *d.* Tucker *v.* Morse, 1 Barn. & Ad. 365.

(*v*) See Sect. 1.

pressly forbids it, and also tenants by the curtesy, or in dower, or persons seised in fee *jure uxoris*, may make demises, without any application to the Court, for any term not exceeding twenty-one years, to take effect in possession. Every demise must be made by deed, reserving the best rent, without fine or premium, with usual covenants and conditions, and must *not* authorize *any* act of waste.

Under this section, the power only extends to settlements made after the act came into force, but the former powers extend to all settlements, past and future. The act was amended by another act, 21 & 22 Vict. c. 94.

In a lease of mines under these acts, the Court will order the appropriation of so much land as may be required for the convenient working of the minerals(*x*).

The Court cannot authorize a lease, if any one of the parties interested under the settlement opposes the application (*y*).

Some doubts having arisen with respect to the severance of the minerals from the estate, under the ordinary powers of sale, exchange, partition, and enfranchisement, an act has lately been passed on this subject. It will be seen, that an important distinction is taken between past and future transactions. In the latter, the Court of Chancery must give its sanction.

By this act, 25 & 26 Vict. c. 108, it is provided, that no sale, exchange, partition, or enfranchisement of land, made in pursuance of any power which does not forbid the reservation of minerals, and which shall have been made with an exception of minerals, and with or without rights or powers incident to working them, shall be invalid on the ground only that the power did not expressly authorize such exception, but shall take effect as if it had been authorized; and no such disposition of any minerals

(*x*) Re Reveley's Estates, 32 L. J., Ch. 812.

(*y*) Re Merry's Trusts, 36 L. J., Ch. 168.

separately from the residue of the land shall be invalid on the like ground, but shall take effect in like manner. But no disposition already declared by a court of competent jurisdiction, or pending in any suit or proceeding, shall be affected by the act.

By another section, every trustee or donee of powers, unless forbidden by the instrument creating the trust or power, may dispose of land with an exception of the minerals, and with or without incidental rights and powers, and may dispose of the minerals in like manner, without prejudice to any future exercise of the authority with respect to the excepted minerals or the land. But every such disposition must be made with the previous sanction of the Court of Chancery, to be given in a summary way on petition—and such sanction once obtained shall enable any future dispositions of the like kind of the same lands. The act does not extend to Ireland or Scotland.

Although the act is silent as to consent of persons beneficially interested, it has been held, that such consent is necessary for their protection (*z*).

The Court will make an order under the act in general terms, without reference to any particular transaction (*a*).

Section III.

LEASES BY ECCLESIASTICAL PERSONS AND OTHERS.

The rights of persons in possession of the property of the Church, with respect to mines and minerals, have been already discussed (*b*).

By the common law, all ecclesiastical persons and all eleemosynary corporations, as masters and fellows of colleges, masters of hospitals and their brethren, if unre-

(*z*) Re Brown's Trust Act, 1 Law Rep., Eq. 74; 32 L. J., Ch. 275.

(*a*) Re Willway's Trust, 32 L. J., Ch. 226.

(*b*) Chap. IV.

strained by the particular provisions of the founder, might have wholly or partially aliened the possessions of the Church (*c*). But all leases by corporations sole, as archbishops, bishops, deans, archdeacons, prebendaries, parsons and vicars, required the confirmation of other persons interested in the property, to render them of sufficient power to bind the successor. Thus, the leases of archbishops and bishops required the confirmation of the dean and chapter of their diocese (*d*); those of a dean, archdeacon or prebendary were to be confirmed both by the bishop and the dean and chapter, in order to bind all parties who might afterwards be interested in the property. Those of a parson or vicar required the confirmation of the patron and ordinary (*e*). The patronage of a perpetual curacy augmented by Queen Anne's bounty is in the patron paramount, as well as in the rector as immediate patron (*f*). If the parsonage or vicarage was a donative, the confirmation of the patron alone was sufficient (*g*); or if the deanery was donative, that of the king only was required (*h*). When the bishop was the patron of the Church, and was required to confirm, the confirmation of the dean and chapter was also necessary, for the advowson is their parcel of the possessions of the see, which cannot be charged by him alone, so as to bind the successor (*i*). The leases of the deans and chapters required no confirmation. The confirmation might take place at any time in the lifetime of the parties to the lease, and as well before as after the making of the lease (*k*). It might even take place after the death of the lessor (*l*).

The powers thus conferred by the common law have,

(*c*) Co. Litt. 44 a.

(*d*) 3 Co. 75; 10 Co. 60 a; 2 Co. 39.

(*e*) Dyer, 61 b, 106 b, 204 b, 356 a, 356 b; Co. Litt. 300 b, 329, 343 b; Degge, 120. See 1 Sid. 75.

(*f*) Bac. Ab. Leases (G), 2; Doe *d.* Brammell *v.* Collinge, 7 Com. B. 939; 18 L. J., N. S., C. P. 305.

(*g*) 1 Roll. Abr. 481; Dyer, 273.

(*h*) Comp. Incumb. 371.

(*i*) Co. Litt. 300 b.

(*k*) Ibid.; Anon., Moore, 66.

(*l*) Newcomen's case, cited 5 Rep. 15 b; Banister's case, Cro. Car. 38.

however, been considerably abridged with respect to all ecclesiastical persons.

The possessions of the Church can no longer be demised by any ecclesiastical persons, whether with confirmation or not, for a longer period than for three lives or for twenty-one years, to begin from the time of making thereof, and for less than the old accustomed yearly rent (*m*).

But archbishops, bishops, deans, prebends, and all other spiritual persons, *except parsons and vicars*, may now grant leases upon the following conditions. The lease must be by indenture; there must be no old lease in existence at the time unless it may expire within a year from the making of the present lease; the lease must not be in reversion; the lands must have been commonly letten to farm by the space of twenty years before; the lease must not be made without impeachment of waste—nor to endure above twenty-one years or three lives from the making of it; there must be reserved by it yearly to the lessors and to those to whom the reversion may come, so much yearly rent as has been accustomably paid within twenty years before (*n*).

All leases by those persons, complying with these regulations, require no confirmation.

All ecclesiastical persons, however, including, of course, parsons, vicars and perpetual curates, may grant leases for twenty-one years or three lives, to begin from the time of making thereof, by reserving the accustomed yearly rent, without complying in all respects with the conditions of the statute of Henry (*o*). But leases made by any single or sole corporation, if not warranted by the statute of Henry, must still receive the usual confirmation required by the common law.

But it is provided that no lease by ecclesiastical persons, except by archbishops and bishops, granted upon the sur-

(*m*) 1 Eliz. c. 19; 13 Eliz. c. 10.
(*n*) 32 Hen. 8, c. 28.
(*o*) 1 Eliz. c. 19; 13 Eliz. c. 10.

render of any subsisting lease, and which purports to convey for a greater number of years than were unexpired under the old lease, should be valid (*p*).

All eleemosynary corporations, whether purely ecclesiastical or temporal, were placed by the restraining statutes in the same condition with respect to the leasing of these lands as deans and chapters or other ecclesiastical corporations aggregate (*q*). The power of leasing lands belonging to hospitals, and houses for the poor, was further restrained by the statute 39 Eliz. c. 5, s. 2, which enacts, that all leases, grants, conveyances or estates, exceeding twenty-one years, and that in possession, and whereupon the accustomed yearly rent or more, by the greater part of twenty years next before the making of the lease, should not be reserved, and yearly payable, should be void.

All leases not conformable to the provisions of the restraining statutes of Elizabeth are thereby declared to be absolutely void. But it is quite settled, that such leases will be good during the life or incumbency of the lessor (*r*). Even after the death of the lessor, they may be confirmed by the successor (*s*). But the mere acceptance of rent will not have that effect (*t*).

It was enacted by other statutes of Elizabeth (*u*), that all leases whereof any former lease for years was not to expire or should not be surrendered within three years after the making of the new lease, should be void. This statute refers only to the leases granted under the 13 Eliz. c. 10, and not to archbishops and bishops.

The conditions prescribed by the statute of Henry are the following:—

I. The lease must be made by indenture.

(*p*) 13 Eliz. c. 10.

(*q*) 13 Eliz. c. 10; Magdalen College case, 11 Co. 76.

(*r*) Doe *d.* Bryan *v.* Bancks, 4 Barn. & A. 407. See Chap. VII.

(*s*) Edwards *v.* Dick, 4 Barn. & A. 217, per Holroyd, J.

(*t*) Doe *d.* Brammell *v.* Collinge, supra; Rickman *v.* Garth, Cro. Jac. 175.

(*u*) 18 Eliz. c. 11; 43 Eliz. c. 9. See infra in this section.

II. There must be no old lease in existence at the time, unless it may expire within a year from the making of the new lease.

III. The lease must not be in reversion.

A lease in reversion cannot be granted, though it be made to determine within twenty-one years or three lives; and though an interest for either of those periods may be granted, it cannot be done by means of two leases, one to take effect after the determination of the former (*x*).

This subject has been before discussed in treating of similar conditions in private powers (*y*).

IV. The lands must have been commonly letten to farm by the space of twenty years before.

Lands let for eleven years at one time, or at different times within that period, will be sufficient; and a tenancy, by deed or parol, from year to year, or at will, will satisfy the statute (*z*).

Waste land which has never been inclosed, and which has never been let at all, cannot, of course, be demised, so as to bind a successor (*a*).

It is not necessary that the letting should have taken place *within* twenty years. It has been held sufficient if the lands were let thirty-two years ago (*b*).

Copyholds are said not to be within the act (*c*). But this has been disputed (*d*).

V. The lease must not be made without impeachment of waste.

It will follow, therefore, that only opened mines can be demised under this statute.

It is not necessary to express that the lessee shall be

(*x*) Doe *d.* Sutton *v.* Harvey, 1 Barn. & C. 426.

(*y*) See Sect. 2.

(*z*) Tustian *v.* Roper, Jones, 29; Co. Litt. 44 b; 6 Rep. 37; Cro. Jac. 76.

(*a*) Doe *d.* Tennyson *v.* Lord Yarborough, 1 Bing. 24.

(*b*) Pemble *v.* Sterne, Sir T. Raym. 165; 1 Lev. 212; Keb. 213; 1 Sid. 416.

(*c*) Rowden *v.* Malster, Cro. Car. 44; Gilb. Ten. 179, 185.

(*d*) 2 Watkins on Copyholds, 194.

punishable for waste. It may be implied by law; as when a lease is made for three lives, the *cestui que vie* may be punished, as an occupant, under the Statute of Gloucester.

VI. The lease must not be made for more than twenty-one years or three lives from the day of the making of it.

This provision has been discussed before (*e*).

VII. There must be reserved yearly rent to the lessors, and to those in reversion so much yearly rent as has been accustomably paid within twenty years.

More than the accustomed rent may be reserved (*f*).

The mode of reservation need not be strictly expressed according to the language of the statute.

We have already had occasion to consider the meaning of the expression, the accustomed rent (*g*).

It was a doubtful question whether two parcels of land not usually let together could not be joined in one lease, with a reservation of one rent, and *vice versâ*, whether lands could be divided, and a *pro ratâ* reservation made for each parcel. These doubts affected all the lessors under the Statute of Henry and some private powers. With respect to ecclesiastical persons and eleemosynary corporations, the latter point has been set at rest by the stat. 39 & 40 Geo. III. c. 41, by which it is enacted, the several rents on any separate demises shall be taken to be the ancient rents within the meaning of the statutes, provided that the aggregate rents shall not be less than the accustomed rent, or be each proportioned to the value of the property demised. This act does not extend to leases made by the other persons mentioned in the Statute of Henry, viz., tenants in tail, and husbands seised in right of their wives. Neither does it authorize the joint demise of lands usually let separately at a rent equal to the whole of the separate rents (*h*).

The requisitions of the statutes of 1 Eliz. c. 19 and 13

(*e*) See Sect. 2.

(*f*) Co. Litt. 44 b; Threadneedle *v.* Lynham, 1 Mod. 203; 2 Mod. 57; 3 Keb. 192, 595; Pollexf. 176; 1 Freem. 92, 179.

(*g*) Sect. 2.

(*h*) See Sect. 2.

Eliz. c. 10, were that the leases should be restrained within a period of twenty-one years, or for three lives, that they should begin from the time of making, and reserve the old accustomed yearly rent.

It has been observed by Lord Hale, that the Statute of Henry was a pattern for the exposition of the exceptions of the 13 Eliz. (*i*). This opinion has been followed on many occasions, and also extended to those of 1 Eliz. c. 19. It has thus been held, that leases under the latter statutes must be made by indenture; that the words "accustomed rent" implies that the lands must have been "customarily letten."

It has been also held, that leases under the two statutes of Elizabeth must be made so far in analogy to the Statute of Henry as not to be without impeachment of waste (*k*).

Those statutes are silent upon the subject of waste; but in an early case which arose upon the construction of the 13 Eliz., it was decided that deans and chapters are restrained from authorizing acts of waste by the equity of the statute, the preamble of which declares, that long and unreasonable leases were the chiefest causes of dilapidations, and the decay of all spiritual livings and hospitality (*l*). It would appear, therefore, that no lease can be made by any ecclesiastical persons or eleemosynary corporations, so as to authorize the lessees to work new or unopened mines or quarries (*m*). Such a lease, however, would be voidable only, and not void. Although not made void by the restraining statutes, nor made valid by the enabling statute of Henry, it would still exist as a lease at common law. The right of the lessors themselves to commit such acts of waste has been already discussed (*n*).

No leases for lives or years could be made by any of the

(*i*) Morrice *v.* Antrobus, Hard. 325.

(*k*) See Bacon's Abr. Leases, E., Rule 8; Doe *d.* Tennyson *v.* Lord Yarborough, 7 Moo. 258.

(*l*) Dean and Chapter of Worcester's case, 6 Co. Rep. 37.

(*m*) Doe *d.* Brummell *v.* Collinge, supra.

(*n*) Chap. 4.

colleges in the Universities of Cambridge or Oxford, or by the colleges of Winchester or Eton, unless one-third of the old rent be reserved in wheat or malt, reserving a quarter of wheat for every 6*s.* 8*d.*, or a quarter of malt for every 5*s.*, and for default thereof, in ready money, after the rate of the best wheat and malt in the markets of Cambridge, Oxford, Winchester and Windsor, the next market day before the rent becomes due (*o*). But an enabling act has been passed (*p*).

It has been seen before, that, when lands already in lease are demised again before the expiration of the previous term, and the latter lease confers a contemporaneous interest with the first, the lease last granted is called a concurrent lease. When persons are empowered to grant such leases to the full extent, it is obvious that, by the repeated exercise of this power, they may be enabled to postpone the possession of those claiming under their successors till the expiration of the full periods allowed by law.

It has never been contended that the Statute of Henry authorized the grant of concurrent leases. They are evidently excluded by the provision requiring all old leases to expire within a year after the making of the new lease. So far, indeed, there may be concurrent leases under this statute.

The statute of 1 Eliz. c. 19, which applies solely to archbishops and bishops, has been decided, though not without opposition, not to forbid the making of concurrent leases (*q*), although it has been held to prohibit leases in reversion (*r*).

The statute of 13 Eliz. c. 10, which applies to all ecclesiastical persons, whether corporations aggregate or sole, is also silent upon the subject; but this was afterwards

(*o*) 18 Eliz. c. 6.

(*p*) See end of Sect.

(*q*) Fox *v.* Collyer, And. 65, pl. 140; Mo. 107, pl. 251; Bridg. by Ban. 596; Evans *v.* Asenith, ibid. 610; Lepur *v.* Wroth, 1 Leon. 38; Grindall's case, 4 Leon. 73.

(*r*) Bridg. by Ban. 136.

remedied by the statute 18 Eliz. c. 11, by which all persons included in the statute of 13 Eliz. were disabled to grant any leases of lands in which there were any former leases which should not expire or be surrendered within three years after the making of the new leases. Within this period concurrent leases may be granted by these ecclesiastical persons; and the surrender may take place at any time within the three years (*s*).

A concurrent lease can only exist where both leases are for years: for a freehold interest cannot be created *in futuro*, and the exception of 1 Eliz. c. 19, is in the disjunctive, for three lives *or* twenty-one years (*t*).

It thus appears, that archbishops and bishops were the only ecclesiastical persons who were permitted to grant concurrent leases for the whole period of twenty-one years, or for three lives; and that, as this power was not given to them by the enabling Statute of Henry, all such leases required the confirmation of the dean and chapter.

But the power to grant concurrent leases, and also new leases, before the expiration of the old ones, has since been restrained by a recent statute (*u*). By that act, no archbishop or bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon or prebendary, or other spiritual person, nor any master or guardian of any hospital, shall grant any new lease, *by way of renewal of any lease*, which shall have been previously granted of the same for two or more lives, until one or more of the persons for whose lives such lease shall have been so made shall die, and then only for the surviving lives or life, and for such new life or lives, as together with the life or lives of such survivor or survivors shall make up the number of lives, not exceeding three in the whole, for which such lease shall have been so made as aforesaid; and when any such lease shall have been granted for twenty-one years, no new lease by way of

(*s*) Moor, 875; Co. Litt. 45 b; 2 Brownl. 134, 148, 164.

(*t*) Co. Litt. 44 b; 5 Co. 2; Moor, 253; Leon. 59; Cro. Eliz. 141, 111; And. 193.

(*u*) 6 & 7 Will. 4, cc. 23, 64.

renewal, or (in the case of archbishops and bishops) concurrently therewith, shall be granted, until seven years of such lease shall have expired; and when any such lease shall have been granted for years, no lease by way of renewal or otherwise shall be granted for any life or lives.

But if it has been the usual practice to renew leases for years at shorter periods than seven years, a renewed lease may be granted conformably to such usual practice, if the usage is proved to the satisfaction of the archbishop, in leases granted by him or by a bishop, and in other ecclesiastical leases, to the satisfaction of the archbishop and also of the bishop, and is certified accordingly. The practice in the case of a corporation sole must have commenced prior to the time of the incumbent for the time being.

The exchange of any life or lives in being, and the grant of any renewed lease for that purpose may be effected with certain consents.

When estates held under leases are sublet to different undertenants, the original lease could not properly be renewed without a surrender of all the subleases. Any of the subtenants might thus prevent a renewal by refusing to surrender. This was remedied by the act 4 Geo. II. c. 28, s. 6, by which it is enacted that the new lease shall be valid and good, without a surrender of the underleases; and all persons are to retain their respective rights and remedies.

New enabling Acts have now been passed. By one act, ecclesiastical corporations, aggregate and sole, may grant leases for long terms of years, under certain restrictions (*x*).

Water, way-leaves, watercourses, railways, and other ways, either subterraneous or over the surface, store-yards, wharfs, and other like easements or privileges, may be demised for any term not exceeding sixty years, in possession,

(*x*) 5 & 6 Vict. c. 108.

and not in reversion, at the best yearly rents, payable half-yearly or oftener, either in the shape of a fixed sum of money, or by way of toll or otherwise, without fine or foregift, other than any provision obliging the lessee to repair any roads or ways, or to keep open or use in any specified manner any water or watercourse, subject to a power of re-entry on nonpayment of rent, and to the execution of counterparts, and with power to insert any other covenants and terms not inconsistent with those required to be reserved or contained (*y*).

Mines, minerals and quarries, with the right of working, and of working any adjacent mine by way of outstroke or other underground communication, and with such land and rights of way and other rights for opening and working the mines demised, and carrying away the produce, or otherwise incident to mining operations, as shall be deemed expedient, may also be demised for any term not exceeding sixty years in possession. Every lease shall contain such reservations by way of rent, royalty, or share of the produce in kind, and such powers, provisoes, and covenants, as shall be approved by the ecclesiastical commissioners, due regard being had to the custom of the country or district, and no fine shall be taken (*z*).

A portion of the improved value, being not more than three-fourths, nor less than one-half, is payable to the commissioners, and the rest to the incumbents.

Every lease must be made with the consent of the ecclesiastical commissioners, and also, as to any benefice, of the patron. All consenting persons are to be parties to the lease (*a*).

By an act, 14 & 15 Vict. c. 104, s. 9, amended by 24 & 25 Vict. c. 105, so as to include rectors and other incumbents, any ecclesiastical corporation, with the approval of the Church Estates Commissioners, may grant mining or building leases, for such considerations, upon

(*y*) 5 & 6 Vict. c. 108, s. 4. (*z*) Sect. 6.
(*a*) See sects. 20, 21.

such terms, and generally in such manner as such commissioners may think fit; and they may require any portion of the rent to be invested and disposed of in like manner as the monies arising from sales under the act. These acts are continued from year to year under the usual act relating to expiring acts.

These acts have been amended by 21 & 22 Vict. c. 57, by which it is declared, that leases of lands, mines and other property may be made for premiums or such other consideration, and in such manner in all respects, as the ecclesiastical commissioners shall think advisable.

By another amending act, 23 & 24 Vict. c. 124, the mines under any lands assigned as the endowment of any see may be demised by the archbishop or bishop, with the approval of the Estates Committee of the Ecclesiastical Commissioners, for such terms and generally in such manner as the committee may think fit, with power to reserve any portion of the rent to the commissioners. In carrying out the powers of leasing mines generally, regard is to be had to the value of existing leases, which are, in the case of leases for years, to be considered to be extended to the 11th October, 1884, at the accustomed rate of fine. In the case of leases for lives the actual value, if beyond that time, is to be estimated according to life tables. Any differences between mining lessees and the lessors, as to any extension of term, may be referred to arbitration, at the option of either party.

By an act, 24 & 25 Vict. c. 105, no prebendary (except of a cathedral or collegiate church), rector, vicar, perpetual curate, or incumbent, can make any leases *under any custom*, or in any other manner than under 5 & 6 Vict. c. 27 and 108, and 21 & 22 Vict. c. 57. The rights of present incumbents are reserved.

By 29 & 30 Vict. c. 81, the Isle of Man is thenceforth excluded from the operation of the ecclesiastical leasing acts, 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57.

By another enabling act, 21 & 22 Vict. c. 44, the

Universities of Oxford, Cambridge and Durham, and their Colleges, and the Colleges of Winchester and Eton, may make leases of mines, way-leaves, and water-rights. This act is extended by 23 & 24 Vict. c. 59, by which the powers are vested in the Copyhold Commissioners.

The tithe lead ore of the rectories of Stanhope and Wolsingham, Durham, is now vested by 21 & 22 Vict. c. 58, in the Ecclesiastical Commissioners, as part of the common fund.

By 11 Vict. c. 13, all ecclesiastical persons, aggregate and sole, and all other corporations, colleges and hospitals, may demise mines and minerals for any term not exceeding forty-one years, at the best and most improved rent, without fine or foregift.

By 23 & 24 Vict. c. 150, relating to the temporalities of the Irish Church, it is enacted, that in all applications by tenants for enfranchisement, inquiry shall be made whether any mines or quarries have been opened or discovered in the lands, and whether any leases of them, or contracts for leases exist. If so, they are to be excepted in the conveyance, with full powers to work and carry away the produce—if not, they may be included in the conveyance, subject to the payment of one moiety of any rent or royalty afterwards accruing therefrom.

By 16 & 17 Vict. c. 137, the Charity Commissioners are empowered to sanction leases of mines in charity lands on any terms they may think proper. By 18 & 19 Vict. c. 124, a majority of acting trustees, being not less than three, may grant all such leases as the official trustee of charity lands is empowered to grant.

By 5 & 6 Will. IV. c. 76, municipal corporations are

prohibited from demising any lands or hereditaments for any term exceeding thirty-one years, without the approbation of three of the Lords of the Treasury, except in certain cases of covenant, custom, and improvement.

It has been seen, that defective leases under private powers are, in certain cases, aided by Courts of Equity. Such a relief, however, has never been applied to ecclesiastical leases, which are expressly excluded from the late act relating to defects in leases under powers (*b*). It was decided, in an early case, that a lease not warranted by the statute of Henry should not be supported in equity by showing good matter for its interference. No meritorious or valuable consideration will dispense with the requisitions of the statutes (*c*).

Section IV.

LEASES BY TENANTS IN TAIL, AND BY MARRIED PERSONS WITH RESPECT TO THE LANDS OF THE WIFE.

It has been seen before, that a tenant in tail, like any other owner of a limited estate, may make a lease which will bind the estate for the period marked out for his own enjoyment—viz., for life. A tenant in tail, in possession, may, of course, acquire an estate in fee simple in the lands; but we are now to consider his powers of leasing, during his limited tenancy.

A lease by a tenant in tail, at common law, will not be absolutely determined by his death, but will be only void-

(*b*) See last section.

(*c*) Roswell's case, 1 Roll. Abr. 379, pl. 6. See Cowp. 267; 2 Burr. 1146; 2 Freem. 224.

able at the election of the heir in tail or reversioner, and may be confirmed in the usual manner, as by the acceptance of rent (*d*); for such leases are derived from the inheritance (*e*).

At common law, husband and wife may make a lease of the wife's lands of inheritance, either by deed or by parol. In the former case, it will only be voidable by the wife or her second husband (*f*), or her heirs, and will be confirmed by the acceptance of rent. In the latter case, it will be absolutely void (*g*). Leases, made by the husband alone, of the freehold estate of the wife, are said to be void, and incapable of confirmation (*h*). The period for the right of election to be exercised is after the husband's death (*i*), and is confined to the wife or those claiming in privity to her or directly under her, and not by title paramount (*j*).

The husband may exercise any acts of ownership over the chattel interests of his wife in lands and hereditaments. It will make no difference, if the wife be only executrix or administratrix (*k*), or if a term has been assigned before her marriage, in trust for her, without his privity (*l*).

By the statute 32 Henry VIII. c. 28, tenants in tail

(*d*) Doe *d.* Southouse *v.* Jenkins, 5 Bing. 469.

(*e*) Co. Litt. 45 b; Earl of Bedford's case, 7 Co. 8 b; Dyer, 46 a, 51 b, 95, pl. 40.

(*f*) Whetstone *v.* Wentworth, Dyer, 159 a, note.

(*g*) Jordan *v.* Wilkes, Cro. Jac. 332; Dixon *v.* Harrison, Vaugh. 46; 3 Bulstr. 272; Bro. Jac. 563; 1 Roll. Abr. 349; Bac. Abr. Leases, C.; Co. Litt. 325 b, n. 2; Anon., Dyer, 159 a. 91 b; 146 b; Arnold *v.* Revoult, 1 Brod. & B. 443; 4 Moore, 66; Rennie *v.* Robinson, 1 Bing. 147; 7 Moore, 539.

(*h*) 2 Saund. 180, n. 9; 1 Roper on Husband and Wife, 94. But see Jordan *v.* Wilkes and Dixon *v.* Harrison, supra; Bro. Acceptance, C.

(*i*) Doe *d.* Collins *v.* Weller, 7 T. R. 478.

(*j*) Smallman *v.* Agborow, Cro. Jac. 417.

(*k*) Thrustout *d.* Levick *v.* Coppin, Bl. Rep. 801; 3 Wils. 277; Arnold *v.* Bidgood, Cro. Jac. 318.

(*l*) Sir Edward Turner's case, 1 Vern. 7; Pitt *v.* Hunt, 1 Vern. 18.

and husbands and wives are empowered to grant leases upon complying with the conditions which have been commented upon in discussing the rights of ecclesiastical persons, to many of whom, as we have seen, the statute is equally applicable.

The statute applies to lands held by the husband in right of his wife, and not to lands held *jointly* with his wife. In the latter case, his single demise will bind his wife (*m*).

In practice, these leases were seldom resorted to; and the statute has been repealed, except as to ecclesiastical leases, by 19 & 20 Vict. c. 120, s. 35. The statute for the abolition of fines and recoveries has provided an easy and inexpensive mode of limited assurance.

By that statute, tenants in tail have the full power to dispose of their lands for any less estate than a fee simple (*n*), and every such partial disposition shall only bar the estate tail, so far as may be necessary to give full effect to it (*o*). If a lease is made by a tenant in tail for any term not exceeding twenty-one years, to commence from the date of it, or from any time not exceeding twelve calendar months from the date of it, and a rent shall be reserved by it, which, at the time of granting the lease, shall be either a rack rent, or not less than five-sixths of a rack rent, the instrument is a good disposition in itself without enrolment. But all other leases, upon any other terms, or made in any other manner, must, like other dispositions under the act, be enrolled within six months from the execution of them (*p*).

(*m*) Co. Litt. 46 b, 351 a; Anon., Poph. 5. See Bac. Abr. Baron and Feme, C. 2. See also Sacheverel *v.* Frogate, 1 Ventr. 161; 2 Saund. 361; 19 Vin. Ab. 139; Cother *v.* Merrick, Hardr. 89; 2 Brod. & Bing. 556; Whitlock's case, 8 Co. 69 b; Hill *v.* Saunders, 2 Bing. 112. Jackson *v.* Morant, Cro. Eliz. 112; Hutt. 102; Smith *v.* Trinder, Cro. Car. 22.

(*n*) 3 & 4 Will. 4, c. 74, s. 15.

(*o*) Sect. 21.

(*p*) Sect. 41.

By the same statute, every married woman may, by deed, dispose of lands of any tenure or any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, as effectually as if she were a feme sole; but no such disposition shall be valid, unless the husband concur in the deed, nor unless the deed be acknowledged by the wife in the manner afterwards pointed out by the act (*q*). Leases are not expressly mentioned in the clause above referred to; but as there is a power of absolute disposition, *à fortiori*, a partial disposition, like a lease, is included.

This act extends expressly to copyholds with respect to tenants in tail, and to lands of *any tenure* with respect to married women (*r*). In the former case, when the tenant in tail has a legal estate, the deed must be by surrender. When he has only an equitable estate, the disposition may be made either by surrender or deed. No particular mode of disposition is mentioned, and any deed, therefore, which would in ordinary cases have effected the purpose, will be sufficient. It must be observed, that when a married woman is tenant in tail, the formalities required by the act with respect to estates tail must be properly attended to (*s*).

The above act was principally confined to England; but similar provisions have since been extended to Ireland (*t*).

It has been seen, that the lands of married women, to which they are entitled in fee, are now within the leasing powers of 19 & 20 Vict. c. 120 (*u*).

Further powers for demising mines in Ireland are given to tenants for life, infants and married women, by 11 Vict. c. 13. The term may be forty-one years at the best

(*q*) Sect. 77.
(*r*) Sects. 50, 77.
(*s*) 3 & 4 Will. 4, c. 74, s. 77.
(*t*) 4 & 5 Will. 4, c. 92.
(*u*) See sect. 2.

yearly rent. The act extends also to all trustees for any purposes.

Section V.

GENERAL OBSERVATIONS.

Such is a general outline of the law with respect to persons who may grant leases.

Similar rules and remarks, it is presumed, will be applicable to licences to work mines. A licence for lives or years is, in effect, a lease. It might certainly be contended that, under private powers, and under the enabling statute of Henry, the grant of a licence would not amount to a demise of the hereditaments authorized to be conveyed, but only to the demise of a new species of property —viz., an incorporeal hereditament arising out of the real subject of the power; and that, therefore, such a grant would not be a sufficient execution of the power, or an adequate compliance with the statute (*x*). But it has been seen that a licence to work mines confers an interest in lands (*y*). The grant of a licence is only the grant of a smaller interest than that which might have been passed by the lessor. He might have demised the mines themselves, and the liberty to work would, of course, have been included in such a demise. Such an objection, therefore, would only amount to the statement of the fact, that the lessor has only effected a *pro tanto* execution of his power, which he may legally do. It has been seen, that a lessor may demise for a shorter term than that allowed by the power (*z*). The grant of a licence would amount to a similar execution.

(*x*) See Pinchin *v.* The London and Blackwall Railway Company, 2 Eq. Rep. 1172; 24 L. J., N. S., C. C. 417.

(*y*) See Chap. V., Sect. 1.

(*z*) Supra, sect. 2.

With respect to all lessors under the statute of Henry, or any other statutes, it has been expressly enacted, that leases of tithes, or *any other incorporeal hereditaments*, shall be good and effectual (*a*).

It may be laid down, as a general principle, that no lessor, however wrongfully he may have exerted an authority, or whatever penalties he may incur by his grant, will be allowed to repudiate his own lease.

Thus, a tenant for life made a lease of coal mines, for the consequences of which he was liable to forfeit his estate.—He, afterwards in conjunction with the remainder-man, filed a bill in equity for restraining the lessee from working the coal, alleging that the lease was made by mistake, and was a forfeiture of his estate. But it was observed by Lord Loughborough, that he could not help that. He could not hear a man coming to disaffirm his own lease. If a tenant for life had sold timber, he could not prevent the vendor from cutting it. It was collusion to bring forward the remainder-man. If he complained, he must file a bill alone (*b*).

The ground of this decision seems to be that, as the remainder-man might have taken advantage of the forfeiture and ejected the lessee, it was a mere colourable proceeding in the tenant for life to unite with him in preventing the lessee from taking the benefit of his lease. The tenant for life must take the consequences of his own act. But there is nothing in this decision to imply that such a lease could not be relieved against on the ordinary ground of mistake in fact.

From the preceding pages, it will sufficiently appear to be a matter of no small importance for a lessee of mines,

(*a*) 5 Geo. 3, c. 17. (*b*) Wentworth *v* Turner, 3 Ves. 3.

in which a large expenditure is often incurred, to ascertain the title of his lessor, for it may prove that the latter has no title at all to grant a lease; and then, it may happen, that, after years of toil, patience and anxiety, the adventurer may be deprived of his reward, when it is almost within his grasp, and even be compelled to refund the proceeds of his previous discoveries.

"The numerous cases in the books," says Lord St. Leonards, "where lessees, and persons claiming under them, have been evicted on account of defects in the titles of their lessors, strongly evince the danger of taking a lease without investigating the landlord's title. No title can be depended upon, however long the estate may have been in the same family. There may be a defect in a settlement, or the person in possession may have a partial estate only, with a power of leasing. All the leases of the Pulteney estate were set aside on account of a power of leasing not having been duly pursued; nor is this the only estate of which the leases have been vacated" (*c*). The leases of the Egremont estate have lately been avoided in the same way (*d*). The dangers arising from previous mortgages have been already pointed out.

A lessee who neglects to call for the title of his lessor will meet with no favour in a Court of Equity. It would be a case of pure negligence and inactivity. It has been clearly decided that a lessor cannot compel the specific performance of an agreement for a lease without the production of a good title (*e*). It is not yet decided whether a lessee can, as plaintiff, call for the title of the lessor. But this right would seem to exist as a natural consequence from the decisions just referred to (*f*). A person

(*c*) Sug. Vend. and Purch. vol. ii. p. 141, 10th ed.

(*d*) Doe *d.* Earl of Egremont *v.* Stephens, supra.

(*e*) Roper *v.* Coombes, 6 Barn. & C. 534; Stone *v.* Gwillim, 3 Taunt. 433; Fildes *v.* Hooker, 2 Mer. 424.

(*f*) See Purvis *v.* Rayer, 9 Price, 448.

incapable of granting a valid lease should not enter into any contract for that purpose; if he does, he should be visited with the consequences of the disclosure. It is quite settled, that the seller of a leasehold estate cannot, in the absence of stipulation or notice to the purchaser, make a good title unless he can produce the title of the lessor (*g*).

In ordinary cases, the carelessness with which leases are accepted is sufficiently to be deprecated. But in mining operations, which *necessarily* presume the outlay of capital, and where an unexpected success may offer strong temptations to the real owners of the lands to avail themselves of the remedies of the law, it is, of course, of infinitely more consequence that the lessees should acquire an indefeasible interest. It is true, lords of manors, and other proprietors, are generally very liberal in their dealings with mine owners. But lessees should look to themselves, and should not imprudently expose themselves to the chance of being thus deprived of the benefits of their speculation, or to being driven to some humiliating terms of compromise, or to what may be still worse, a long and expensive course of litigation. But if it be imprudent on the part of the lessees to dispense with an investigation of title, it is also unfair, and in some instances dishonest, in the lessors, to withhold, in such cases, the evidence of their ownership. The lessors, in many cases, should bear in mind that the mining adventurers are not only increasing the general value of the estates by the employment of labourers, but that they are exploring and ascertaining, often at great risk and expense, the extent and capability of property which might otherwise long remain undiscovered and unprofitable to all, but which, if their efforts are successful, may yield a far more abundant harvest than can be procured from the surface. It is unfair, therefore, to place

(*g*) Ibid.; Souter *v.* Drake, 5 Barn. & Ad. 992.

lessees in a position in which they may not be well secured and freed from all apprehensions in respect of their interests in the property. If a person assumes the character of a lessor, with the knowledge that the interest he is conferring is incapable of being supported, he is acting in a manner morally dishonest, although it may not always happen that he can be brought within the just punishment of the law.

An agreement for a lease implies an undertaking by the lessor that he has a right to grant it; and, if he has no right, he is liable in damages to the intended lessee. When a lease is actually granted, it becomes subject to the law of estoppel; and the lessee must then rely on the covenants of the lessor (*h*).

(*h*) Stranks *v.* St. John, 36 L. J., C. P. 118.

CHAPTER X.

PARTNERSHIPS IN MINES.

I. *The general Nature of Mining Partnerships — The Cost-Book System.*
II. *The Contract and Dissolution of Partnership.*
III. *The Liabilities and Duties of Partners.*
IV. *The Partnership Property.*
V. *The Remedies of Partners with respect to each other.*
Practical Remarks.

SECTION I.

THE GENERAL NATURE OF MINING PARTNERSHIPS—THE COST-BOOK SYSTEM.

ALMOST all mining adventures are, in this country, carried on by persons in partnership; and it will, therefore, be proper to bestow upon this subject a particular attention.

Mining has been described as a species of trade (*a*); but it did not follow that mining was such a trade as to subject the proprietors to the operation of the old bankrupt laws.

The act of 6 Geo. IV. c. 16, s. 2, after enumerating several descriptions of persons, enacts generally, that all persons who, either for themselves, or as agents or factors for others, seek their living by *buying and selling*, or by the *workmanship of goods or commodities*, shall be deemed

(*a*) Story *v.* Lord Windsor, 2 Atk. 633; Lawton *v.* Lawton, 3 Atk. 16; Amb. 114; Tredwen *v.* Bourne, 6 M. & W. 461.

traders liable to become bankrupt. The words "buying and selling" are used in the old statute of 21 James I. c. 19. But the words, "by the workmanship of goods or commodities," were additional, and their operation affected several of the decisions under the previous statute. They had, however, no reference to mining operations, or even to the processes immediately depending upon them.

The policy of the old English bankrupt laws excluded from their operation all those pursuits and occupations which are necessarily or closely connected with the enjoyment of land. In this respect, these laws differed materially from those of most other countries whose codes of commercial policy have been mainly derived, as even in Scotland, from the civil law. The English legislature, from the most remote period of its history, struggled severely and successfully in opposing the adoption of a code which was so much at variance with the spirit of the great source of English law—the feudal system. The strong bias of the English rulers in favour of the land, as the basis of feudal connection and personal importance, and the strong attachment of almost all classes to the pursuits of agriculture, long combined to cause our parliaments to look with jealousy upon any alterations which might tend to render the land more subservient to the purposes of commerce, or even completely available for the payment of debts. These feelings have, in recent times, yielded much to the urgent demands of society—and the English bankrupt laws have received, in these respects, great alteration.

As the decisions under the old law of bankruptcy are closely connected with other subjects discussed in this chapter, a brief summary of the cases may still be useful.

As minerals form part of the land, mining adventurers, in many cases, possessed the immunities of those whose pursuits are connected with land. The questions arising upon this subject were sometimes very embarrassing.

It was quite clear, that when minerals were sold in their natural condition by the owners or occupiers of land or mines, there was no trade within the meaning of the bankrupt laws. There must be both a *buying* and a selling to constitute such a trade. There was no workmanship of goods or commodities, for no change was effected in the constitution of the article, and there was no new adaptation of it to a different purpose. Most of the metallic ores and many of the earths require, indeed, the labour of mining or excavation, and the process of being washed and freed from the foreign impurities mixed with them. But the sole object of these pursuits is to obtain the mineral in its pure and natural state, and in these cases, the mineral itself never becomes strictly the subject of workmanship.

It was, accordingly, long ago decided, that a person who bought a coal mine, worked it, and sold the produce, was not necessarily a trader within the bankrupt laws (*b*). A similar decision was made in the case of a person selling stones from a quarry (*c*). The same principle applied to the ores of metals or any other substances acquired in a similar manner, and to salt works (*d*).

It having been established that an occupier of land enjoying the profits of it in this manner was not liable to the bankrupt laws, the cases proceeded a step further, and decided that a person, under such circumstances, might also be allowed, without incurring that liability, not only to subject the produce of the land to a process of manufacture, so as to change its external or chemical character, but also to *purchase* other ingredients to mix with the produce, so as to manufacture an entirely different article. In either case, the additional processes were considered as incident to the full enjoyment of the property of

(*b*) Port *v.* Turton, 2 Wils. 169.

(*c*) Ex parte Gardner, 1 Rose, 377; 1 Ves. & B. 45.

(*d*) Port *v.* Turton, supra; Ex parte Atkinson, 1 M. D. & G. 300.

the occupant, and as enabling him, in the words of Lord Mansfield, to bring the produce advantageously to market (*e*).

Thus, the conversion of milk into cheese, of apples into cider (*f*), of coal into coke (*g*), of limestone into lime (*h*), of clay into bricks (*i*), were all excluded from the operation of the statutes. In one case, it was held that if a person made bricks from his own estate, and bought chalk and burnt it with clay, not for the purpose of carrying on lime-burning as a business, but as the most convenient mode of burning the clay into bricks, it was not a trading, although the chalk was not necessary, and the lime produced in the process was sold (*k*). The purchase of materials for carrying on the manufacture of alum, under such circumstances, was also held not to subject the purchaser to the bankrupt laws (*l*).

The produce of coal mines and other speculations undergoes no process which requires the purchase of another article to render it fit for the market. It was doubted whether a person might purchase a particular species of coal in order to render his own more marketable, without being liable to the bankrupt laws. The metallic ores, on the other hand, and other substances, after being effectually separated from the soil, may indeed be also marketable, in the strict sense of the word, in the same manner. But they are only marketable to particular persons, whose business consists in preparing them, by the proper application of other materials and approved processes, for the general market. This latter occupation is often carried on by such persons, who purchase the minerals, and are, of

(*e*) 1 Brown, 178.

(*f*) Parker *v.* Wells, infra.

(*g*) Ex parte Harrison, 1 Bro. 175.

(*h*) Ex parte Ridge, 1 Rose, 316; 1 Ves. & B. 360.

(*i*) Parker *v.* Wells, infra; Sutton *v.* Weeley, 7 East, 442; 3 Smith, 445; Ex parte Gallimore, 2 Rose, 424.

(*k*) Paul *v.* Dowling, M. & M. 263; 3 Car. & P. 500.

(*l*) Newton *v.* Newton, 1 Cooke, 64.

course, to be considered as ordinary traders. But it is very often pursued by the producers themselves, and in that case they were not subject to the bankrupt laws, as they were only engaged in preparing the produce of their lands, so as to make it profitable, and bring it advantageously to market. If they, in such cases, purchased other articles of the same nature, which might be required for the proper and advantageous manufacture of their own minerals, and a portion or the whole of those articles were necessarily vended with the produce of their mines, they might have been equally exempt from becoming traders within the meaning of the bankrupt laws. The qualities of iron, for instance, are often such as reasonably require the admixture of proportions of other iron ore, of a different quality and description, to be obtained from other proprietors, in order that, in the process of smelting, the ores raised by the purchasers may acquire an improved condition and an additional value. Again, lead ore usually contains a proportion of silver, of very variable amount, which is separated from it by approved processes. It sometimes happens that the producer of an ore containing a very small quantity of silver, finds it advisable to purchase other ores containing a greater quantity of the precious metal, in order to procure that contained in his own ore more profitably or more advantageously. The lead, both produced and purchased, might, in such a case, have been sold without producing liability to the bankrupt laws.

The law upon this subject was well expressed by Lord Ellenborough, in the case of Sutton *v.* Weeley (*n*). This was a case of brick making, which is very similar, in this respect, to the smelting processes. In the present case, he observed, the defendant could in no way be considered as buying anything which he sold again; but, like a burner of his own chalk or rock into lime, the smelter from his

(*n*) 7 East, 446.

own mines of iron or lead ore into pigs, or the manufacturer of his own rock into alum, he appeared merely to have carried his own soil to market in some way manufactured. In these several cases, although the surface of the earth might produce some profit, yet the selling the soil under the surface, or parts of the soil, in a state essentially altered by various processes of manufacture, had been held not to alter the character of the land owner, nor to convert him into a person who can be properly said to carry on the *trade of merchandize.*

So far all the authorities agreed; but a difference of opinion prevailed with respect to the extent to which the occupier went in purchasing other materials to mix with the produce, the relative expense of manufacture, and the intention of the parties conducting the business.

This difference arose in cases of brick making, in which it is almost always necessary to buy other ingredients, as coal ashes, breese and straw; and, where the operations are generally destructive, for a time at least, to the ordinary profits of the land.

A person rented an extensive farm of eight hundred acres, in which there was a parcel of brick ground, for twenty-one years. The brick ground was once let to a sub-tenant, who carried on there the business of brick making. On his death, the business was taken up by the alleged bankrupt, the plaintiff, and son of the first lessee. The father afterwards died, and the lease of the whole farm was renewed by the son. Lord Mansfield directed the jury, that, if the plaintiff made bricks for his own buildings, though he sold what he did not use, they should not find him a trader; but if they thought he carried on the trade for public sale, merely with a view to the gain he expected, they should find him a trader. The plaintiff was, accordingly, found to be a trader. The point being argued in the Court of Common Pleas, it was there decided that he was not a trader.

But this judgment was reversed in the Court of King's

Bench, upon a writ of error. Lord Mansfield, in delivering the judgment of the Court, said, that where the produce of the land was merely the raw material of a manufacture, and was used as such, and not as the mode of raising the produce of the land; in short, where the produce of the land was an insignificant article, compared with the expense of the whole manufacture, the occupier ought to be considered a trader. The brick ground was taken with a view of carrying on a trade for public sale; the land produced nothing; the lease was merely a purchase of clay, and just the same as if he had bought it by so much a load; he had nothing to do as a farmer; his sole object was making bricks for sale. The case was afterwards taken to the House of Lords, but was disposed of on the ground of there not having been a sufficient finding by the jury to grant final judgment; and the subsequent proceedings led to no further decision (*p*).

In the case of Sutton *v.* Weeley (*q*), Lord Ellenborough, in delivering the judgment of the Court, refrained from giving an opinion upon the case of Parker *v.* Wells; but the tenor of that judgment is evidently against the grounds of the decision of Lord Mansfield. Later decisions also condemned these grounds, and exempted brickmakers from the bankrupt laws (*r*).

The law upon this subject was not altered by the statute of 6 Geo. IV. c. 16, in which are added the words, "or by the workmanship of goods or commodities" (*s*).

It made no difference if the occupier of the land had a limited freehold, or chattel interest in the land (*t*). But if a person purchased materials of earth or stone or other

(*p*) Parker *v.* Wells, 1 Brown, C. C. 179; Cooke, B. L. 47; S. C., sub nom. Wells *v.* Parker, 1 T. R. 34, 783. See Ex parte Magennis, 1 Rose, 84; Ex parte Moule, 14 Ves. 603.

(*q*) 7 East, 466.

(*r*) Heane *v.* Rogers, 9 B. & C. 577; 4 M. & R. 486.

(*s*) Ex parte Burgess, 2 Glyn & J. 183; Ex parte Liddard, cited ibid. 190; Heane *v.* Rogers, 9 B. & C. 590.

(*t*) Ex parte Gallimore, 2 Rose, 424; Sutton *v.* Weeley, 7 East, 442; Ex parte Burgess, supra.

minerals from other persons, and used them in a manner unconnected with an advantageous mode of taking the produce of his land, and sold the objects either in the same or an altered condition, he was a trader within the meaning of the bankrupt laws (*u*).

In one case, the lessee of an iron mine had purchased large quantities of pig iron, which he manufactured into cast-iron implements for the purpose of working the mine, and had sold the rest of the cast-iron which he did not use to persons in the neighbourhood. The Court of Review refused to annul a fiat issued against him on that ground, but gave him leave to try the question in an action at law (*x*).

In another case, an iron-master was in possession of mines of coal and ironstone and works, under a lease. In carrying on the smelting operations, he was accustomed to mix about thirty-five per cent. of the iron ore produced from the demised mines with about sixty-five per cent. of purchased ore. It was held, that he was a trader within the meaning of the Bankrupt Acts (*y*).

It was expressly enacted by 12 & 13 Vict. c. 106, that *brick makers, alum makers and lime burners* should be subject to the bankrupt laws.

But the whole of this portion of the bankrupt law has now been changed by the abolition of the distinction between bankruptcy and insolvency. All debtors, whether traders or not, are now expressly subject to the bankrupt laws (*z*).

(*u*) Parker *v.* Wells, supra; Paul *v.* Dowling, 3 Car. & P. 500; Ex parte Harrison, 1 Bro. 173; Watkins *v.* Caddel, cited 1 Bro. 175, 178; Ex parte Gallimore, supra.

(*x*) Ex parte Salkeld, re O'Neill, 3 M. D. & D. 125.

(*y*) Turner *v.* Hardcastle, 11 C. B. (N. S.) 683; 31 L. J., C. P. 193.

(*z*) 24 & 25 Vict. c. 134, s. 69.

The incorporation, regulation and winding up of trading companies and other associations, whether with limited or unlimited liability, are now within the provisions of a new code, "The Companies Act, 1862" (c. 89).

By this act, no company or partnership of more than twenty persons can now be formed for mining purposes, unless it is registered, or is formed under some other act of parliament or letters-patent, or is engaged in working mines within the jurisdiction of the stannaries.

The act does not apply to the companies then in the course of being wound up under previous acts.

II. We now come to the consideration of an important subject of a different character, in which the intention of the parties will be found to form a very essential element.

Whatever may be the nature of mining, and whether the occupation may be so pursued as to have been excluded from the operation of the old bankrupt law or not, it may be carried on as a trade, in a manner which will subject the adventurer to all the consequences of a particular partnership.

The question of the existence of a partnership, however, may often depend upon very nice considerations, and is described in one case by Lord Eldon as a very difficult question (*a*); for the adventurers may only be the joint tenants, or tenants in common, of an estate in land, the profits of which they combine to enjoy and realize, by consenting to appoint a general system of management. In this situation, they will be considered, with respect both to themselves and third persons, as the ordinary owners of land, working their respective shares of the mines, responsible only for their own acts, subject to no laws of partnership whatever, and possessing distinct rights in the property.

It becomes, therefore, important to discuss a question which, in cases of alleged partnership, must always be preliminary to further proceedings.

(*a*) Crawshay *v.* Maule, infra.

It may be laid down, as a general rule, that when the trade is carried on in such a manner as would have brought the adventurers within the operation of the old bankrupt law, a partnership must, in such cases, always necessarily subsist, for they will be commercial traders without reference to the production of minerals at all.

It has been seen that the quantity of interest which the owners for the time being might have in the lands did not influence the question of liability to the bankrupt laws. For the same reasons, it will not affect the question of partnership. Whether any or all of the owners have acquired an absolute or limited interest of any description, they may agree to enjoy the possession of the common object in a particular manner.

Neither does there appear to be any reason for supposing that, though one owner was possessed solely of the legal estate, and the others had only equitable interests, arising too in different proportions, and evidenced by different means, any presumption of partnership would necessarily arise from that circumstance; for lands are frequently enjoyed in this manner by tenants in common, and there is nothing inconsistent with their rights of ownership.

If, however, it could be distinctly shown that the land was not intended to be held in common, but to remain the absolute property of any one or more of the parties, evidenced, for instance, by the payment of rent, a case of commercial partnership might fairly be presumed with respect to all concerned.

The relation of partnership, as will be afterwards shown, may be constituted either by express stipulation, or by implication deduced from the acts of the parties.

When the mining operations are carried on by several landowners under a co-partnership deed or agreement, or even a verbal agreement, from which it may be clearly established that the parties intended to enter into a trading adventure, and to become co-partners in the ordinary and commercial sense of the word, a partnership will, of course,

be constituted, not only as between themselves, but as to all other persons. But with respect to the presumption arising from persons holding themselves out to the world as partners, it is sufficiently obvious that something more is required in such cases than what would be necessary to establish a partnership under ordinary circumstances. For all the characteristic features of a general partnership *may* be equally applicable to persons who work the mines under their lands as parts of the profits of those lands. Such persons, in the absence of other circumstances, cannot fairly be presumed to have intended to render themselves liable to all the consequences of a commercial partnership. The question, in such cases, will therefore naturally arise—viz., what additional circumstances will be requisite, in the absence of express agreement, to raise the presumption of partnership.

The first case which occurred on this subject was that of Crawshay *v.* Maule (*b*). In that case certain lands had been held in tenancy in common, from which considerable quantities of iron and coal had been extracted, and upon which very extensive iron works had been erected. A bill was filed by one of the co-tenants against the others for a dissolution of partnership. As the facts bearing upon this particular point were not sufficiently set out in the bill, an affidavit in explanation of the nature of the business was ordered, in which it was stated, that the iron works at Cyfarthfa had been conducted as a trading concern—that the produce of the mines consisted of ironstone, coal and limestone—and that, at the works, large quantities of iron had been and were manufactured, sometimes from the materials obtained from the leasehold lands in question, and sometimes from pig iron and finers' metal purchased in London, Plymouth and Bristol; that from the first establishment of the works, the proprietors had been in the habit of making very considerable purchases

(*b*) 1 Swanst. 523.

of iron ore from Lancashire, pig iron, and finers' metal, and of old wrought iron, naval and ordnance stores, for the purpose of manufacture at the works into various sorts of iron, and re-selling them in that manufactured state; that these purchases had been made by the successive firms with a view to profit, by manufacturing the articles purchased into bar and other iron for re-sale, and *not merely for mixing the same with the iron produced from the works for improving the latter, or bringing it to a better market.* Lord Eldon observed, that it was difficult to establish that this was an interest in land, distinct from a partnership in trade—a mere interest in land, in which a partition could take place; for when persons, having purchased such an interest, manufacture and bring to market the produce of the land (I) as one common fund, to be sold for their common benefit, it might be contended that they have entered into an agreement, which gives to that interest the nature, and subjects it to the doctrines, of a partnership in trade.

It may be observed, that all these acts are equally applicable to strict owners of land who are not partners in a trade, and this idea must have suggested itself to the mind of Lord Eldon. For on a subsequent day he remarked, that a very difficult question might arise, whether, if the parties, being originally tenants in common of a mine, agreed to become jointly interested in the manufacture of its produce for the purpose of sale, they continued mere tenants in common of the mine—still more, if not only carrying the produce of their own mine to market, they became purchasers of other property of a like nature, to be manufactured with their own. On a still subsequent day, Lord Eldon, in delivering final judgment, said, that after repeated consideration, he entertained no doubt that

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(I) The affidavit above referred to, by which it appears that they brought to market the manufactured produce of other lands, was not then before the Court.

it was a trading concern, and that a partnership had subsisted.

If the contents of the affidavit alluded to in the above case were correct, there could be no doubt that the concern was a trade, which subjected the parties to the operation of the old bankrupt law, and therefore to the consequences of partnership. The purchase of other materials for the sake of manufacturing and selling them, as distinct articles of commerce, was quite sufficient to divest them of the exclusive character of owners of land.

In the above case, the parties were also interested in the lands in the same proportions, as in the trade itself. It may perhaps be presumed, that when the proportions differ, the intention of the parties to become partners will be more readily, though not necessarily, implied.

The point was shortly afterwards adverted to in another case before the same Chancellor. But it did not form part of the ground of decision in that case, as it was decided that a manager of the mine might be appointed by the Court, even if the parties were not actual partners, but only tenants in common of land (*c*).

In another case, six persons had taken a lease for years of mines, and also another lease of the surface lands, under which the mines were situated, and had worked the mines as a joint concern, divided into equal shares. One of them was appointed manager, and had become much indebted to it. He afterwards became bankrupt, and it appeared he had mortgaged his shares. A bill was filed for the sale of the property; and that it might be declared, that the shares of the bankrupt should be applied, in the first place, in repaying to the partnership the debt which he had incurred in the management of the concern. The true question, therefore, was, whether the parties stood in the relation of partners to each other. The above case of Crawshay *v.* Maule was very properly distinguished, in

(*c*) Jefferys *v.* Smith, 1 Jac. & W. 298.

the argument, from the present case, in which no other articles appear to have been purchased; and it was contended, that if the rules which are applicable to common trading partnerships were to be extended to part owners of mines, it would be difficult to foresee what consequences might follow, affecting interests of the greater magnitude, and placing many individuals of the highest rank and fortune in situations which they never contemplated—and that the parties must be considered as tenants in common of the mines and lands. But Sir John Leach, M. R., observed, it was true a mining concern differs in some particulars from a common partnership—but it had been repeatedly held to be in the nature of a trading concern. He said that in Crawshay *v.* Maule, Lord Eldon had expressed a doubt, whether, if persons, previously entitled as tenants in common to mines, were to form a mining concern, the general principles of partnership would apply, and he the (M. R.) was not aware that the particular point had ever been decided; but the distinction there was, that the interest in the mines was expressly acquired for the purpose of a partnership, and the general principle was therefore to be applied (*d*).

This decision seems to rest upon substantial reasons. The question is, then, one depending upon intention, and it may be concluded, that, when persons acquire interests in lands apparently for the sole purpose of working the mines in them, they must be considered as entering into a commercial partnership. There does not appear to be any ground for distinction in such cases, if the parties have even acquired a permanent and absolute interest in the property. But it does not follow that, in every such case, such an inference can be drawn from the acts of the parties. An estate may be purchased or acquired for a definite period by a tenant in common, who may proceed forthwith to work the mines. But the mines may not

(*d*) Fereday *v.* Wightwick, 1 Russ. & M. 45.

have formed the only or even the primary inducements for effecting the purchase or acqusition. Much will always depend upon the particular facts. But it is submitted, as a general rule, that in all such cases there must not only be an express intention to work the mines, but this object must have been either *solely* contemplated by the parties, or of such paramount consequence as to effectually overbalance any other advantages anticipated from the estate. For the mines may form very important considerations in the arrangements of capitalists, and yet their existence need not preclude the motives which may proceed from the supposed general advantages of the investment.

This principle, however, will regulate by far the greater proportion of mining cases not specially provided for in this country, where it is usual for adventurers only to obtain limited interest in the mines themselves, without acquiring any rights to the general inheritance. It may, therefore, be safely asserted, that in all such cases, where the obvious intention of the parties to acquire interests in the land for the sole purpose of carrying on mining speculations can be deduced from the nature of those interests and the manner of their acquisition, the parties will be considered, from these circumstances alone, to have entered into a particular partnership, and to be liable to all its consequences.

On the other hand, if it can be shown that lands have been long in the possession of the different parties, or of those through whom they claim, or that they have been acquired without any intention to work the mines as an exclusive object, and if, after the mining operations have commenced, the parties have carefully avoided the assumption of the outward *indicia* of partnership, they must, it is conceived, be considered merely as the proprietors of land exercising the common acts of ownership in a manner adapted to the nature of their respective interests in it.

If an interest in opened mines is enjoyed by persons as

a distinct inheritance or possession, it would appear, that it will only be under peculiar circumstances that the parties can be considered to be exempt from the obligations of partnership. The intention, in general, will be too strongly expressed. It is quite possible, however, for persons to have been originally entitled to distinct shares in such a property, without ever having received profits as a partner, or having personally interfered in the management of the concern. It may also frequently happen that mines in this condition may devolve, by conveyance or operation of law, upon persons who have thus contracted no engagement of partnership (*e*). A person may still continue to be entitled to the legal interest in his share, or to the legal or equitable reversion in it, and may cease for a time from becoming liable as a partner. Such experiments, however, are often dangerous, if it is desirable not to incur the liability.

In all cases where it is intended that a trading partnership should be established, it is desirable that the parties should, by express agreement in writing, declare their intentions, and thus resolve all doubts upon the subject. This precaution seems not only to be reasonably required by the public, who may thus deal with them upon the faith and with all the advantages of a partnership; but it may often be indispensable for properly securing the interests of the parties themselves, by enabling them to prosecute the works in an efficient manner.

The consequences of the above distinction are these:— If the works are carried on by persons as mere owners of land, concurring in a general system of management for their common benefit, the shares of each person will only be liable for his individual engagements and to the payment of debts contracted by himself or his authorized agents, without interfering with the shares of the other tenants in common. It is true that, in cases of disagreement and mismanagement, a Court of Equity will appoint

(*e*) See Jefferys *v.* Smith, 3 Russ. 158.

a general manager for the benefit of the whole (*f*). But this remedy will very inadequately provide for the exigencies of such a case. In no other respect will the parties be liable to the consequences of a partnership in trade. The shares cannot be sold for the liquidation of accounts as between the parties themselves; there cannot be enforced, as upon a dissolution, a general sale of the whole property; there will be no restraint upon the introduction of new partners, and there will, in short, be none of those general incidents of a commercial partnership, the exercise of which may prove of so much importance to the effectual and regular working of a mine.

Mines are often carried on by companies incorporated by charters, letters-patent and acts of parliament, and lately under the Joint Stock Companies Acts.

Other mining companies are formed under deeds of settlement, or other ordinary articles of partnership, or by parol agreement. The members in all these cases are often so numerous, as to acquire the title of Joint Stock Companies. But it should not be forgotten, that there is no substantial difference, as to the public, in powers, rights, duties and liabilities, between these companies and ordinary partnerships for similar purposes. It will be seen, afterwards, that some freedom from general liability may prevail in particular pursuits, in consequence of some notorious system of management by one or more on behalf of others. But the shareholders will still remain largely liable for the acts of the officers and working partners, and in many cases, where the members are not numerous, of the partners generally.

The *cost-book system* seems to have arisen in the natural desire to carry on a small concern by numerous pro-

(*f*) Jefferys *v.* Smith, 1 Jac. & W. 301.

prietors, with as much economy and as little partnership risk as possible. The mine is vested in one or more, in implied trust for the rest; it is divided into shares among all, and an agent (purser) is appointed to manage the mine. He keeps the cost book, in which he enters all the minutes of meetings, the proceeds and expenses of the mine, the names of the shareholders, the accounts in respect to each other, and the transfer of shares. Meetings of the owners are convened generally once in two months, at which those present consider the accounts and reports of the agent, make calls, or declare dividends, direct the mode of carrying on the mine, and exercise a general control over the agent and the affairs. These questions are, in case of difference, decided by a majority. Any owner is allowed to retire by giving notice in writing to the purser, and by settling his account. The transfer is usually effected by substituting one name for another, on proper authority in writing from the vendor or person entitled, and without the express consent of any of the other partners. It has been seen in a former chapter that such transfers are not within the Statute of Frauds, and that a mere entry in the book by the purser completes the transfer (*g*). There is usually no deed of settlement dispensing with the *delectus personæ* or the restraint of transfer; but as the terms of partnership, as well as the partnership itself, may subsist by parol, even when there is an imperfect deed, this freedom of transfer is presumed to be established by original consent or acknowledged usage, in the same way as if a deed of settlement had expressly authorized it. In this respect, therefore, there is no difference between this system and companies formed under such deeds. It will be seen, afterwards, that in all cases where the right of free transfer is not founded on previous compact, or custom implying compact, there is the same *delectus personæ* in mining as in other partner-

(*g*) Chap. VI.

ships. The absence of this power of selection by all the partners may affect the liability for the acts of any others than the recognized agents, but it seems to depend much more on the actual transfer of authority. The chief distinction between cost-book companies and ordinary joint stock companies consists in the way in which the executive is constituted and controlled. The regularity and frequency of general meetings, and the supreme power of the whole body at such meetings, render a directorship often unnecessary, and allow to the purser only a brief interval of limited discretion. The actual freedom from excessive liability arises from the open meetings and the regular discharge of accounts. But the legal liability itself is not affected by these precautions; and there is no reason for distinguishing these companies on this ground from many others (*h*). Similar remarks apply to the rights and powers of partners (*i*). Accordingly, the cost-book system need not hereafter be separated from many unincorporated mining partnerships which employ a somewhat different machinery for the same end.

It may, indeed, be questioned how far many of these latter companies can be said to be formed on the cost-book system. That system arose in Cornwall, and is extending now into many other counties. When its leading features are not visible, a company will not come within it by merely using the title. On the other hand, it is probable that many companies, without using the name, may be considered to be within the system. For the same kind of system has largely existed in many districts, and particularly in the North, without acquiring any such designation.

The Court of Common Pleas refused to decide, on a summary application, whether a cost-book company was

(*h*) See Johnson *v.* Goslett, 18 Com. B. 728; 25 L. J., C. P. 274; (in error) 27 Ib. 122; Geake *v.* Jackson, 36 L. J., C. P., 108.

(*i*) Sibley *v.* Minton, 27 L. J., Ch. 53.

a public company within s. 14 of 1 & 2 Vict. c. 110, for extending the remedies of creditors (*k*).

In another case, it was held, that such a company was not a joint-stock company, under any act of parliament—and, therefore, that, in a bill for an account, it was necessary to make all the shareholders parties to the suit (*l*).

Conventions have been concluded with France and Belgium for giving to all commercial, industrial, and financial companies mutual rights of resort to legal tribunals, and powers of exercising all their rights, in conforming to the laws of each country.

Section II.

THE CONTRACT AND DISSOLUTION OF PARTNERSHIP.

I. The contract of ordinary partnership may be induced either by the express intentions or agreements of the parties, or by acts from which it may be plainly inferred that such a relation has been established.

In the first instance, the parties will have become partners, both as between themselves, and all other persons; for there has been an actual contract, and the acquisition of a certain interest in the trade, which will suffice to constitute the legal relation for all purposes. But, in the second instance, a partnership may be established, which may bind its members to the claims of third persons, and yet there may not necessarily be constituted a partnership as between themselves (*m*); for it may have been declared by previous agreement that the parties, as between themselves, shall not be liable to the responsibilities and conse-

(*k*) Nicholls *v.* Rosewarne, 5 Com. B. 480; 28 L. J., C. P. 273.

(*l*) Sibley *v.* Minton, 27 L. J., Ch. 53.

(*m*) Geddes *v.* Wallace, 2 Bligh, 270.

quences of partnership. Though this agreement will not avail against the world, whose conclusions on this subject must be drawn from the acts of the parties, yet it may effectually limit their liabilities, as between themselves; and it would appear that, even in the absence of an express stipulation of the above description, their actual situation with respect to each other may have the same effect (*n*).

With respect to the mode of creating a partnership, by express agreement, it is not necessary, in this place, to say much. Such a contract need not be reduced into writing, and signed by the parties (*o*). If it be general, and made without any particular provisions, it will follow that the liabilities and rights of the parties will be governed by the general principles of law. If it be express, and yet does not reach all the duties and obligations, these will be duly implied by law. The conduct and practice of partners may impose new terms, in waiver of old terms, whether implied or expressed (*p*). On the other hand, the intentions of the parties may, speaking generally, be made, by express stipulation, to control the operation of the general law upon their mutual interests. *Modus et conventio vincunt legem;* but the rights of third persons will not, in general, and without notice, be affected by any stipulations respecting the mutual rights and interests of the partners.

The other mode of creating a partnership is by just presumption from the acts of the parties. Thus, a communion or participation of profits (*q*), a person suffering the use of his name in a business (*r*), or admitting any

(*n*) Hesketh *v.* Blanshard, 4 East, 144.

(*o*) Peacock *v.* Peacock, 11 Ves. 49; Featherstonhaugh *v.* Fenwick, 17 Ves. 298; Alderson *v.* Clay, 1 Stark. 405. See also Voet. Com. lib. 17, tit. 2, s. 1.

(*p*) Smith *v.* Jeyes, 4 Beav. 503.

(*q*) Waugh *v.* Carver, 2 H. Black. 235; Bird *v.* Aston, cited 6 Bing. 788; Lawler *v.* Kershaw, 1 Mood. & M. 93; Shep. Touch. 71.

(*r*) Guidon *v.* Robson, 2 Campb. 802; Young *v.* Axtell, 2 H. Black. 242; Spencer *v.* Billing, 3 Campb. 310.

property to be the joint property of himself and another person (*s*), the attendance at partnership meetings, the general admission or representation of being a partner (*t*), or any voluntary act which may show a joint interest in the subject of speculation (*u*), have all been held sufficient to constitute a partnership with respect to third persons.

In all cases, however, where a person seeks to charge another as partner, with a partnership debt, upon the general ground of representation to the public, there must be just reason for a jury to suppose that the creditor believed the latter to be a partner at the time when credit was given to him. In mining adventures, this question is frequently important, for credit is often given to a mining firm in which the partners are not always known to the public. In such cases, a creditor must prove, either that there was probable ground for his presuming that the person charged was a partner, or that the latter has acquired an actual interest in the concern.

Thus, in an action of assumpsit for goods sold and delivered to a mining establishment, it appeared that the plaintiff, when he purchased the goods, had no knowledge of the defendant as a shareholder; she had spoken and written of herself in private letters and in society, as being one, but she had never signed any deed; she had paid her deposits on her shares, and had received certificates, signed by the secretary, to the effect that she was the proprietor of certain numbered shares, and that her name was duly registered in the cost book of the mine, and that she was entitled to the profits of the shares. Lord Tenterden, in

(*s*) Parker *v.* Barker, 1 Brod. & B. 9; 3 Moore, 226.

(*t*) Goode *v.* Harrison, 5 Barn. & Ald. 150; Maudsley *v.* Le Blanc, 2 Car. & P. 409; Braithwaite *v.* Schofield, 9 Barn. & C. 401.

(*u*) Harvey *v.* King, 9 Barn. & C. 356; Vice *v.* Lady Anson, 7 Barn. & C. 409; 1 M. & R. 113; 1 M. & M. 97; 3 Car. & C. 19; Dickinson *v.* Valpy, infra.

his address to the jury, observed, it was clear, the plaintiff did not actually give credit to the defendant, and that the latter never held herself out to the world as a partner. If she was chargeable, she could only be so on the ground that she was really interested; and no mistaken supposition of her own, that she was so, would make her liable, unless it were communicated to the plaintiff so as to mislead him. The partnership, he said, was not strictly a trading partnership; it was one formed for the purpose of working a mine, a species of real estate, and an interest in a real estate could only pass by certain formalities; it was clear that the certificates and registration were not sufficient to pass it. Was there, then, any evidence from which it could be concluded that the defendant ever had any interest in the mines conveyed to her? The history of the mine was not much explained; but it appeared that one Thomas had something to do with it in 1822, before the company was thought of, and no one else was heard of. It was not pretended that the defendant derived any interest from any one else, and it was not clear, even, that he had any. If he had none, he could communicate none; if he had any, the defendant would be liable or not, as he had transmitted it to her or not. His name was not on the certificates, which did not profess to pass anything from him, or to make him accountable for the money paid upon them, or for the profit arising from the mine. Directors were mentioned, but he was not shown to be one of them, or in any way connected with them. The certificates, therefore, which clearly did not in themselves pass any interest, seemed not even to furnish any evidence that any interest had passed from Thomas, or *from any one else* to the defendant. The question for the consideration of the jury was, whether it was made out to their satisfaction, that the defendant had any interest in the mine. He thought it was not. Upon this the plaintiff elected to be nonsuited, and it was afterwards

moved to set aside the nonsuit. But the Court of King's Bench refused to grant a rule (*x*).

The above decision gave dissatisfaction, and it has been severely treated. The only point was, whether the defendant was actually an owner of shares, and there can be no doubt now that there was evidence for a jury to draw that inference, although it might not be conclusive. It has been seen that a valid and complete transfer of cost-book mining shares may be effected even by an entry in the book, and that such transfers are not in some other cases within the Statute of Frauds (*y*). The receipt of profits, which has been called the test of partnership (*z*), was wanting; for there were no profits. But the admission of partnership was not disposed of by alleging that it was made under the erroneous impression that she had a legal interest. In a late case, an action was brought against a shareholder in a company for working mines in Brazil, and evidence was given, that, by the law of Brazil, mines were usually transferred by deed. It was objected for the defendant that he had acquired no title by deed. But the objection was distinctly rejected (*a*). In two other cases of actions for goods supplied to the use of a mine, there was no proof of any deed of settlement, or of actual partnership, or of the existence of directors, or of the distribution of any shares, or of any personal interference on the part of the defendant. The only evidence of partnership consisted of admissions in conversation, to the effect that he held a hundred shares, that he would see the manager, and that arrangements should be made for payment. The defendant produced evidence to show he had never acquired an actual interest in the shares. It was held by the Court of Queen's Bench, that the admissions were proper evidence for a jury, and though their

(*x*) Vice *v.* Lady Anson, 7 Barn. & C. 409; 1 M. & R. 113; 1 M. & M. 97; 3 Car. & P. 19.

(*y*) See Chap. VI.

(*z*) 6 Bing. 776.

(*a*) Steigenberger *v.* Carr, 3 Scott, N. R. 406.

effect might have been stronger if made while the work was proceeding, they were evidence if uttered at any time (*b*).

It has been expressly decided, that if a person enter into an agreement for the purchase of mining shares, and the intended purchaser takes possession, and interferes in the business, he will be liable as a partner as between himself and the other adventurers, even though the purchase is never carried into effect, and the purchaser has only had an equitable title.

The partnership was carried on under a deed which provided for the transfer of shares. Two of the partners afterwards entered into agreements with a person called Guppy, who, with another joint purchaser, acted as partners under a firm whose style expressly named them. It turned out afterwards, that the agreements could not be carried into execution, for want of a good title, and the parties were relieved from the purchase (*c*). It was contended that the intended purchasers could not be considered as partners, though they acted as such; and that they must be merely considered to have acted as trustees for the persons interested in the property. But it was decided by Lord Lyndhurst, that, though as between them and the vendors that might be a good argument, the plaintiff, the other partner, had nothing to do with the relative situation in which those parties placed themselves with respect to each other. The vendors possessed interests in the concern; they entered into arrangements, in consequence of which the purchasers were put into possession of the partnership property, and continued in it, acting as partners with the plaintiff. The necessary consequence was, that the latter was entitled to consider them as partners liable to him for their proportion of the debts of the partnership (*d*).

(*b*) Ralph *v.* Harvey, Richards *v.* Harvey, 1 Q. B. 845; 10 L. J., N. S., Q. B. 337.

(*c*) See 3 Russ. 171.

(*d*) Jefferys *v.* Smith, 3 Russ. 158.

An important question of this kind arose, with respect to creditors, under a deed of arrangement.

The Stanton Iron Works were assigned to five trustees for creditors, upon trust to continue and carry on under the same style or firm the business theretofore carried on by the owners, with power to procure fresh leases, and to erect new buildings. The trustees were authorized to employ all such managers, agents and other persons as they should deem expedient, and in all respects to carry on the business to all intents and purposes in the same way as though they were fully and absolutely entitled thereto, also, to pay rents, interest and the costs of carrying on the business, and to divide the net residue of the profits amongst the creditors specified in the schedule. Power was given to the creditors to alter the trusts and make new rules, to direct the discontinuance of the business, and to wind up the affairs. Half-yearly meetings of creditors were to be held for inspection of accounts and declaration of dividends. There was a resulting trust for the owners, after payment of all debts. There was also an indemnity by the executing creditors against all claims on the late owners. The deed was executed by the owners, the trustees and the requisite number of creditors. The business was carried on in conformity with the provisions of the deed for about six years, and the plaintiff had supplied the firm with iron, for which they had accepted bills. The bills were accepted in this form:—"Per pro. Stanton Iron Co., James Haywood." He was managing trustee, with authority to accept bills. Two of the other trustees were sued. One had never acted as trustee, and the other had duly retired from the trust. They both executed the deed as creditors. The Master of the Rolls had decided that the creditors were not partners, and that the company was not within the operation of the Winding-up Acts (*e*). But it was held by the Court of Common

(*e*) Re The Stanton Iron Company, 21 Beav. 164; 25 L. J., Ch. 142.

Pleas, that, as the creditors were to be rateably paid out of the profits, they were liable as partners. This decision was affirmed in the Exchequer Chamber. But the Court was equally divided. Three of the judges were of opinion, that the creditors were not liable as partners, and that, if they were, the trustees under the deed, and not the creditors, were the company in whose name the bills were accepted. The case was taken to the House of Lords. The judges who were summoned were again equally divided. But it was unanimously decided by the House, that the creditors were not partners, and that the judgments below should be reversed. The main reasons were, that the creditors could not receive more than the amount of their debts, and that any surplus profits would belong to the former owners (*f*).

It has frequently been decided of late years, notwithstanding some earlier decisions (*g*), that a person may, to a certain period and extent, perform many acts in contemplation only of becoming a partner, and in order to assist in the formation of a company, without incurring necessarily the immediate liabilities of a partner. A joint-stock scheme requires the issuing of prospectuses and subscription lists, and the contribution of money to meet the current expenses of making known and recommending the proposed undertaking. The directors or ostensible managers, even of an incipient adventure, will be liable for the debts incurred on behalf of the proposed company (*h*).

(*f*) Hickman *v.* Cox, 18 Com. B. 638; 25 L. J., C. P. 277; Ib. (in error), 27 L. J., C. P. 129; Ib. (H. of L.), 30 L. J., C. P. 125.

(*g*) Holmes *v.* Higgins, 1 Barn. & C. 74; Ellis *v* Schmæck, 5 Bing. 521; 3 Moo. & P. 220; Perring *v.* Hone, 4 Bing. 28; 12 Moore, 135; 2 Car. & P. 401.

(*h*) Doubleday *v.* Muskett, 4 Moore & P. 750; 7 Bing. 110; Glenester *v.* Hunter, 5 Car. & P. 62; per Tindal, C. J., Hancock *v.* Hodgson, 4 Bing. 269; 12 Moore, 504; Attwood *v.* Small, 1 M. & R. 246; 7 Barn. & C. 390; 2 Y. & J. 72; 3 Car. & P. 208; Maudsley *v.* Le Blanc, 2 Car. & P. 409; Kidwelly Canal Company *v.* Raby, 2 Price, 93; Barnett *v.* Lambert, 15 M. & W. 489; Higgins *v.* Hopkins, 3 Exch. 163; Bailey *v.* Macaulay, Dawson *v.* Hay, Wilson *v.* Holden, 19 L. J., N. S., Q. B. 73; 15 Q. B. 533.

But the provisional subscribers, viz., those who countenance and forward the scheme, without undertaking any part of the actual management, are only considered as persons engaged or willing to become partners at some future day, when the company has been formed upon the proposed terms, and they will not thus become liable, because the debts are not contracted by their authority, and because, under the terms usually propounded, they may elect rather to forfeit their shares than to join finally in prosecuting the adventure.

Thus, in an action which was brought against a person for the payment of a bill of exchange, drawn and accepted by a mining company, it appeared that in the early part of the year 1825, certain persons associated for the purpose of forming a company to work mines in Devonshire and Cornwall. On the 7th of April in that year, a meeting was held, and several resolutions were passed with respect to the formation of a company, the amount of capital and shares, and appointment of directors and other officers. These resolutions were advertised, and a counting-house was taken in London, clerks were engaged, a contract was entered into for purchasing mines in Cornwall, an agent was employed to reside there, and some of the mines were actually worked. The defendant, on the 6th of April, applied to the secretary for thirty shares, and ten were appropriated to him. He paid an instalment of five pounds per share, and received in return some printed receipts, called scrip receipts. He afterwards took these scrip receipts to the counting-house, where there was a meeting of the directors, and paid a second instalment of ten pounds per share, and signed a deed. In July, 1826, he attended a general meeting of the shareholders. The defendant offered evidence of what he said at this meeting to show that he went to it for the purpose of declining an interest in the company, and not for the purpose of taking any part in the direction of its affairs. But Mr. Justice Burrough rejected the evidence. The defendant also tendered

evidence to show fraud and false representations on the part of the original projectors, in order to induce persons to become members of the company. This evidence was also rejected by the Judge, on the ground that fraud in the concoction of the concern, though practised on the defendant, was no answer to the action by a stranger. The defendant was found to be a partner upon the direction of the learned Judge. It was held by the Court of King's Bench, that the defendant was not liable, upon other grounds, and a nonsuit was entered; but it was evidently the impression of the whole Court that there was not sufficient evidence of his being a partner.

The latter point was fully discussed by Mr. Justice Parke, who said, that, though the defendant would have been bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated directly and in express terms that he was a partner, and the plaintiff had acted upon that statement, there was, however, no reason, in that case, to say that the defendant had ever held himself out, either directly or indirectly, to the plaintiff as a partner. He was not liable, therefore, on the ground of misrepresentation. It had been next said that he was bound because he was, in point of fact, a partner. It was to be observed, that amongst the circumstances relied on to show that, was the fact of the defendant's attendance at some meeting of the shareholders; but as the learned Judge had shut out the evidence of what passed at the meeting at which the defendant attended, that attendance ought not to have been used against him, and, therefore, on that ground, there ought to be a new trial. But it was very difficult to say there was sufficient evidence to go to the jury that the defendant was actually a partner, because all the acts proved and relied upon at the trial were equally consistent with the supposition of an *intention* on his part to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of an existing partnership. There was

a great difference between the two cases. If there was a contract to carry on any business by way of present partnership, between a certain definite number of persons, and the terms of that contract were unconditional or complete, the partners gave to each other an implied authority to bind the rest to a certain extent. But if a person agreed to become a partner at a future time with others, provided other persons agreed to do the same, and advanced stipulated portions of capital, or provided any other previous conditions were performed, he gave no authority at all to any other individual, until all those conditions were performed. In those cases, in which a plaintiff has not been induced by the defendant's representation to give credit to him, but seeks to fix him because he has really authorized the contract to be made, the plaintiff must show that authority, and an authority upon condition not performed is no authority at all (*i*).

This view of the subject has been fully confirmed by an important case decided in the Court of Common Pleas, in which the law regulating these proceedings is fully propounded (*k*).

It thus appears that, before the actual formation of any company, a person will not necessarily become a partner by agreeing to take certain shares, paying the amount of deposits, attending preliminary meetings, and acquiescing generally in the provisional system of management. But if he interfere in the management of the concerns even before they have arrived at any state of maturity, he may become liable as a person to whom credit is given. If, again, the partnership can be considered as having once

(*i*) Dickinson *v.* Valpy, 10 Barn. & C. 128; 5 M. & R. 126; see Edmunds *v.* Bushell, 35 L. J., Q. B. 20; 1 Law Rep., Q. B. 97.

(*k*) Fox *v.* Clifton, 6 Bing. 776; Moore & P. 712. See also Bourne *v.* Freeth, 8 Barn. & C. 632; 4 M. & R. 512; Scott *v.* Berkeley, 3 Com. B. 925; Reynell *v.* Lewis, Wyld *v.* Hopkins, 16 L. J., N. S., Exch. 25; 15 M. & W. 517; Kisch *v.* Venezuela Central Railway Company, 34 L. J., Ch. 545; Ross *v.* The Estates Investment Company, Limited, 36 L. J., Ch. 54.

been actually formed, a person may so far identify himself with the interests of the concern in the estimation of the public, as to make himself responsible as a partner, by any of those acts which would, under ordinary circumstances, have had the same operation, and although there may be no evidence to show that he has acquired a real interest in the adventure. The public cannot then presume a mere contemplation of partnership. Thus, the admission of a person that he is a partner, even before he has signed the deed (*l*), the attendance at any meetings of the shareholders without taking any prominent part in the management (*m*), and any other voluntary act which can be fairly construed as placing him in a situation in which a person, who was aware of any of these acts before credit is given, might justly be presumed to give credit to the concern on his account, will be sufficient to contract the obligation of partnership, with respect to third persons, as a holding out to the world.

All these and similar acts will not be mere facts for the jury, but their legal result will be considered by the Court (*n*).

In a case before cited, the shares were subscribed for and allotted, but the calls were not paid up. The defendant attended occasionally at the office and at meetings of the company. The report stated the calls to be paid, but he had the means of ascertaining that they were not paid. It was held, that there was sufficient evidence for the jury to find that he had authorized the directors to go on with the company without the payment of calls, and that he was liable as a partner (*o*).

In another case, the deed of settlement provided that the holders of scrip shares should not be considered quali-

(*l*) Harvey *v.* Kay, 9 Barn. & C. 356.

(*m*) Maudsley *v.* Le Blanc, 2 Car. & P. 409; Braithwaite *v.* Schofield, 9 Barn. & C. 401.

(*n*) Fox *v.* Clifton, 2 M. & Scott, 146; 9 Bing. 115.

(*o*) Steigenberger *v.* Carr, 3 Scott, N. R. 406; 10 L. J., N. S., C. P. 253.

fied proprietors. The plaintiff had sold to the defendants, who were directors of a mining company, several shares in another concern, for a sum of money and certain scrip shares in the company. The scrip certificates were delivered to him, and the defendants gave him a promissory note for the money, but not as directors. The plaintiff never paid any instalment nor signed the deed of settlement. The defendants, in an action on the note, pleaded that they made the note as directors, and that the plaintiff was a partner. But it was held, that the plaintiff had not determined to become a partner, and that there was only an inchoate right of partnership (*p*).

When there is a material difference between a prospectus, on the faith of which a person has had an allotment of shares, and the articles of association, which have never been communicated to him, and he has received no dividends nor otherwise acted as a partner, the Court will strike out his name in the registered list of shareholders, and he will cease to be a contributory under the winding-up acts. In a case of this kind, the prospectus was founded on the expectations of profits from one particular mine in Russia, and the memorandum of association extended to any Russian mines. This variance was held to be fatal (*q*).

There cannot, in such cases, be any acquiescence on the part of a shareholder without a knowledge of the facts. Mere lapse of time, therefore, cannot amount to acquiescence (*r*).

A company was formed for working mines in Westphalia. In an action against a proposed shareholder, general evidence was given that nothing had been done in this country towards final constitution. It was held,

(*p*) Fox *v.* Frith, 10 M. & W. 11 L. J., N. S., Exch. 336.

(*q*) Re The Russian Vyksonasky Iron Works Company, Ex parte Stewart, 35 L. J., Ch. 738. See Overend, Gurney & Co. (Limited), re Oakes' case, re Peek's case, 36 L. J., Ch. 233.

(*r*) Ibid.

in the absence of contrary evidence, that the company was never finally constituted (*s*).

In another case, where a cost-book mine had been abandoned before all the shares mentioned in the prospectus had been subscribed for, or the deposits all paid, an allottee of shares was allowed to recover back his deposits (*t*).

The payment of a commission to a person on all goods sold to his own workmen does not make him a partner (*u*).

By a late statute, it is enacted, that no partnership shall be constituted by the advance of money, by way of loan, on which interest is to be paid at a rate varying with the profits, or by a share of the profits—nor in the remuneration of an agent or servant by a share of the profits—nor by the receipt of annuities or a portion of the profits in consideration of any sale of good will. But all claims founded on these transactions will be postponed, in bankruptcy, to other creditors (*x*).

The subscribers to the memorandum of association of a limited company duly registered are legal directors till the first general meeting of the shareholders, and are competent, under the ordinary regulations of the act, to appoint a manager of a mine with a salary, although the manager may have been one of the directors (*y*).

A mine in Cornwall was purchased for 1,000*l.* in cash, and 15,000*l.* to be paid in cash or shares at the end of six months, if it should be deemed desirable to continue operations, the payment or the surrender of the mine to the vendor being left to the option of the adventurers. There was then established a company on the cost-book system,

(*s*) Bristow *v.* Secqueville, 5 Exch. 275; 19 L. J., N. S., Exch. 289.

(*t*) Johnson *v.* Goslett, 18 Com. B. 728; 25 L. J., C. P. 274; (in error) 27 Ib. 122.

(*u*) Pott *v.* Eyton, 3 Com. B. 32; 15 L. J., N. S., C. P. 257.

(*x*) 28 & 29 Vict. c. 86.

(*y*) Eales *v.* The Cumberland Black Lead Mining Company, Limited, 6 Hurl. & N. 481; 30 L. J., Exch. 141.

and 15,000 shares were reserved for the vendor, 33,750 were allotted to three other persons, and the remainder distributed to others, of whom the defendant was one. It was also proposed and accepted, that the three persons should find the capital required for the mine for the next six months. At a subsequent meeting of shareholders it was resolved that three of the shareholders, of whom the defendant was one, should be a managing committee (*pro tem.*), and should form rules; a purser was appointed (also *pro tem.*), and the offer with respect to finding the capital was accepted. The defendant was present at both meetings. During the six months the plaintiff supplied to the order of the purser the requisite machinery for extracting gold from quartz. The title of the company was "The Cwmheisian Gold Mining Company." An action was brought against the defendant as a partner. It was contended for him, that the only persons liable for goods for the six months were the persons who undertook to find the capital, and that the other partners were not liable till they had exercised the opinion, and had definitively taken the mines. But it was held, that the operations of the six months were not restricted to the benefit of the three persons who advanced the capital, and that the defendant was liable as one of the partners interested (*z*).

By "The Companies Act, 1862," it is declared that no company or partnership of more than twenty persons can be formed for general purposes of profit, unless it is registered under that act, or is formed under some other act of parliament, or letters patent, or is engaged in working mines within the jurisdiction of the Stannaries. This act forms the existing code for the incorporation, regulation, and winding-up of all joint-stock companies, to be formed or wound up after 2nd November, 1862. It contains special provisions relating to the Stannaries Courts. The proper court for winding-up mining companies within

(*z*) Peel *v.* Thomas, 24 L. J., N. S., C. P. 86.

the Stannaries is the Court of the Vice-Warden, unless he certifies that in his opinion the company would be more advantageously wound up in the High Court of Chancery. The proceedings may be removed from the Courts of Chancery in England and Ireland into the Bankrupt Courts.

The signature to a deed of settlement will have relation to the time of paying the deposits, and the person signing will be considered a partner from that period (*a*). Those who sign such a deed, and are desirous of withdrawing from the concern, must, therefore, conform to the stipulations contained in it, by which provision is usually made for that purpose.

Two persons agreed to become partners in a colliery, which was to be demised on royalties or rents, and to divide these between them in some proportions. There was no written agreement. A bill was filed by one of the partners who produced a receipt in writing for part of an instalment, signed by the other, but which did not disclose any terms of contract; which were entirely disputed. It was held, that the agreement was for the purchase of land, and was within the Statute of Frauds, that there had been no part performance, and that the contract could not be carried into effect (*b*).

II. Having thus seen how a partnership in mines may be contracted, it may next be considered how the contract may be dissolved.

Partnerships in mines, like common partnerships, although carried on for specific purposes, in connection with the enjoyment of certain interests in land, and with a limited and definite object, are subject to a dissolution by notice or mere verbal agreement, or by death, bankruptcy, sale of co-partnership effects under a separate execution (*c*), outlawry or attainder of a co-partner, or the marriage of a

(*a*) Lawler *v.* Kershaw, 1 Mood. & M. 93.

(*b*) Caddick *v.* Skidmore, 2 De G. & J. 52; 27 L. J., Ch. 153.

(*c*) Waters *v.* Taylor, 2 Ves. & B. 299.

feme sole. But almost all these events, as we shall see, may be provided for by express stipulation, or by compact implied by custom.

A contrary doctrine was maintained, in one case, by Sir John Leach, M. R. (*d*). But there is no ground for the distinction. Partnerships in mines were treated by Lord Eldon, in the great case of Crawshay *v.* Maule (*e*), as subject to the ordinary rules with respect to dissolution. It was observed by him in that case, that when there is nothing in the contract to fix the duration of a partnership, it may be determined at a moment's notice by either party. By this notice, the partnership is dissolved to this extent, that the Court will compel the parties to act as partners, in a partnership existing only for the purpose of winding up the affairs. So, death terminates a partnership, and notice is no more than notice of the fact that death has terminated it (*f*). The doctrine, he continued, that death or notice ends a partnership, had been called unreasonable. But if men will enter into a partnership, as into a marriage, for better and worse, they must abide by it; if they enter into it without saying how long it shall endure, they are understood to take that course in the expectation that circumstances may arise in which a dissolution will be the only means of saving them from ruin; and considering what persons death might introduce into the partnership, unless it worked a dissolution, there was strong reason for saying that such should be its effect. Is the surviving partner to receive into the partnership, at all hazards, the executor or administrator of the deceased, his next of kin, or possibly a creditor taking administration, or whoever claims by representation or assignment from his representation (*g*)? If there

(*d*) Fereday *v.* Wightwick, 1 Russ. & M. 49.

(*e*) 1 Swanst. 521; 1 J. Wils. 181. See also Jefferys *v.* Smith, 3 Russ. 158.

(*f*) See Vulliamy *v.* Noble, 3 Mer. 514.

(*g*) 1 Swanst. 508.

is a trading partnership, the common principles must be applied (*h*).

An assignment of shares will thus produce a dissolution of partnership, in the absence of previous stipulation to the contrary. The maxim of the civil law, *cum aliquis renunciaverit societati, solvitur societas,* is applicable to all descriptions of partnership. The contract of partnership is founded upon a *delectus personæ,* and the special confidence which is necessarily supposed to result from a connection originating in the mutual selection of partners. In one mining case, indeed, Lord Eldon asked the question, "might it not be a partnership, with liberty to each partner to introduce any other person into the partnership?" In that case, the question in dispute was with respect to the appointment of a receiver. It had been contended, that the defendant was more properly to be looked upon as the purchaser of an undivided interest in real property, which might be sold from time to time, as the owner pleased; and that if this could be done, a case of partnership could not be established, without the consent of the other parties. Lord Eldon's question merely pointed out the possible and ordinary existence of a partnership, subject to the same powers of alienation as the estates of tenants in common (*i*).

It appears from a subsequent report of the same case, that the agreement, under which the partnership was carried on, contained a stipulation that the partners might be at liberty to assign their shares to a certain extent (*k*).

No person, therefore, can introduce another person into the partnership without previous agreement to that effect with the other partners. This agreement may either be express, as in cases regulated by deeds of settlement, or it may be implied, as in the cost-book system, by notorious

(*h*) Ibid. 523.

(*i*) Jefferys *v.* Smith, 1 Jac. & W. 301.

(*k*) Jefferys *v.* Smith, 3 Russ. 158.

usage and consistent practice. The same rule may be held to apply to other parol mining partnerships, consisting of many shareholders, exercising the right of alienation frequently and without question in the same way. It can hardly be denied that this freedom of transfer, without dissolution, and without *express* stipulation, may be considered as an invasion of the fundamental rule of selection. For the more correct legal result, in such transactions, seems to be, that a dissolution is effected, and that a new partnership is immediately formed, on the old terms, on the admission of each new partner (*l*). This process must indeed necessarily ensue when the partners are not numerous, and when usage cannot properly be held to supply the want of express agreement.

In the case of a mine, in Wales, conducted on the cost-book principle, it was specially provided that any shareholder might determine his liability on giving notice in writing to the purser of his desire to retire, and on depositing with the purser the transfer of the shares, and signing a relinquishment of all claims on the company. A shareholder signed a notice of retirement and relinquishment in a form received from the office of the company, and sent it as a letter to the purser. A few days afterwards the purser sent a new form, extending the liabilities to the end of the current month. The shareholder refused to sign this form. The company was ordered to be wound up. The Master placed the name of the shareholder on the list of contributories. But it was ordered by the Lords Justices to be removed from the list (*m*).

If shares are assigned under special stipulations for the purpose to an insolvent or improper person, the liability of the assigning partner will cease for the future (*n*), for there is not in our law, as in the civil law, any implied trust that a person will exercise such a power for the benefit of the

(*l*) See ibid.

(*m*) Ex parte Fenn, Re Pennant and C. Cons. Lead M. Comp., 22 L. J., N. S., C. C. 692.

(*n*) Jefferys *v.* Smith, 3 Russ. 158.

remaining partners. It is usual, therefore, to reserve in partnership deeds which confer a power of alienation some right of control to the other partners.

If the partners carrying on the concern refuse to acknowledge such a person, or any other person, as a partner, they cannot afterwards charge him with the liability of a partner, though the latter will, of course, become liable to the public (*o*).

It was a maxim of the civil law, from which many of the principles of English law with respect to this subject have been derived, that the contract of partnership was so strictly founded upon a *delectus personæ*, that a stipulation for admitting the heir of the deceased into the partnership was declared void (*p*). Such a restraint upon the transactions of mankind has not been countenanced by our law. It is now very usual, in partnership contracts, to stipulate that the partnership shall still subsist, notwithstanding the occurrence of events which would otherwise determine it.

In this manner, almost all the causes of dissolution may be effectually provided for, so as to control the ordinary operation of law. The term of partnership may be made to endure for a certain number of years, and the contract be thus rendered incapable of being determined at the mere will of the parties, or by death, or assignment of shares. But it would appear that no stipulation will prevail against the legal consequences of bankruptcy and felony (*q*). In general, the various intentions of the parties may be expressed by particular clauses and stipulations, which will be carried into full effect, if they are not opposed to the general policy of the law.

Stipulations of this nature may sometimes be implied from the acts and situation of the parties, and from the nature of the interests which may be vested in the part-

(*o*) Ibid. 169.

(*p*) Dig. lib. 17, t. 2, l. 35, 52, 59, 65, 70.

(*q*) Wilson *v.* Greenwood, 1 Swanst. 471.

ners. If these interests, for instance, have devolved to them in a manner which is incompatible with the notion, that the partnership is to be dissolved by the usual means, it will be held to continue during the existence of those interests, if the parties do not enter into an agreement for dissolution. Thus, in the case of Crawshay *v.* Maule, so often cited (*r*), the testator, Richard Crawshay, was possessed of the mines and iron works under three leases for ninety-nine years each, at an annual rent. By his will, he gave to his son, William Crawshay, the plaintiff in the suit, 100,000*l.*, and to Joseph Bayley 25,000*l.*, to be transferred from his account on the ledger to Bayley's, intended as a capital for him to become a partner with his executor, of one-fourth share in the trade of all those works, so long as the lease endured. He then gave to Benjamin Hall and his wife and their heirs all the residue of his estate, and appointed Hall the sole executor. But by a codicil, he gave to his son, the plaintiff, "three-eighths shares of his concerns at the iron works, so the partnership would stand at his demise, William Crawshay three-eighths, Benjamin Hall three-eighths, Joseph Bayley two-eighths." These three persons afterwards carried on the works in co-partnership, but without any articles of agreement. The plaintiff purchased the shares of Bayley, and the concern was carried on by the other two, who purchased the rents reserved by the leases in the proportions of their respective interests in the trade; but the leases were still subsisting. Hall died, and in his will gave several directions to his trustees with respect to carrying on or discontinuing the works. The plaintiff filed his bill for a judicial declaration of dissolution by the death of Hall, and prayed an account and sale of the property, and a division of the proceeds. It was insisted by the defendants, that it appeared from the will and codicil of the testator to have been his intention that his legatees

(*r*) 1 Swanst. 495.

should, for themselves and their representatives and families respectively, have an interest in the leasehold premises and iron works commensurate with the terms for which they were held, and, therefore, that no sale should be directed, but that the works should continue to be carried on in partnership. Lord Eldon held, that the intention of the testator in this respect was not apparent from the language of his will, but, he admitted, that if the testator and owner of the property had thought proper, by his will, to declare that his legatees should continue the partnership as long as the longest of the leases should endure, no person claiming under that will could enjoy the benefits conferred by it, without submitting to the inconveniences which it imposed (*s*). It had been contended, he observed, on another day, that the late Mr. Crawshay, having formed this business, must have had an intention to keep it together, as one concern, though he distributed different interests in it among different members of his family: had he so said, without doubt those who took his bounty must have taken it on the terms which he imposed (*t*).

It had been also contended, in the above case, that the purchase of leases must be considered as evidence of a contract for the continuance of the concern. Lord Eldon said that, in the absence of express, there might be an implied, contract, as to the duration of a partnership, but he must contradict all authority if he said that wherever there was a partnership, the purchase of a leasehold interest of longer or shorter duration is a circumstance from which it is to be inferred that the partnership should continue as long as the lease. It would follow, that if the partners purchased a fee simple, there should be a partnership for ever. Unquestionably, partners may so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure; but it was equally certain that there was no general rule, that partners

(*s*) 1 Swanst. 510. (*t*) Ibid. 520.

purchasing a leasehold interest must be understood to have entered into a contract of partnership commensurate with the duration of the leases. The purchase of a lease was no more than the purchase of an article of stock, which, when the partnership is dissolved, must be sold (*u*).

What circumstances connected with the purchase of leasehold interests would be sufficient to imply a contract of partnership corresponding with their duration, it would be impossible to particularize. It has been suggested, that when a lease excludes assignees and sub-tenants, it might possibly be deemed evidence of such an intention (*x*).

Several partners purchased an estate, and took a lease from the Bishop of Durham of an adjoining colliery for twenty-one years. They then signed a memorandum to the effect that they should be entitled to the estate and to the coal royalty in equal shares. A misunderstanding having arisen with one of the partners, the others passed a minute, offering him his capital, with interest, and resolving that a dissolution of the partnership should be made with respect to the dissenting partner. On his still declining to pay his calls or sign a partnership deed, he was served with a notice of dissolution to the same effect. Negotiations took place respecting the payment of the capital and other compensation, and the terms of dissolution. In this stage, an action was brought against all the partners, including the differing partner, on a bill of exchange accepted in the name of the firm, to which the partner pleaded non-acceptance. It was held, on the trial, that the parties had agreed to be partners in the colliery for twenty-one years; that the notice of dissolution had no effect, and that the notice had been repudiated by the partner. But the Court of Exchequer held this to be a misdirection. Parke, B., said, the agreement had reference to a loan and to other collieries, but the partners did

(*u*) 1 Swanst. 508, 520, 526; see Burdon *v.* Barkas, infra.

(*x*) 2 Bell, Com. 643.

not mean to bind themselves irrevocably for a certain term. By executing the lease, they became bound to the lessor, but not to each other, to work the collieries in a particular manner. They were partners for an indefinite period, and any one might determine the partnership. But there was evidence from which the jury might infer that all the parties came to a new agreement to carry on the concern as partners after the notice (*y*).

When partnerships are entered into for a term, the parties are considered to become partners for the whole period, if they be living and are of the same legal capacity to continue contracts of this description. But there are, in such cases, circumstances which will authorize a Court of Equity to decree a dissolution before the regular expiration of the term.

Impracticability of effecting the purposes of partnership has been held to be a just ground for such a decree. In one case, the partnership was entered into for spinning cotton by a new invention under letters-patent. The plaintiff alleged that the mode had been frequently tried, and was found to be impracticable. It was referred to the master, to ascertain the truth of the statement, with an intimation that if he reported in favour of the plaintiff's case, a dissolution should be decreed, upon which the defendant consented to a dissolution (*z*).

The same principle would be held to apply to mining speculations. In most cases, however, it would be impossible to say that any particular mining scheme was impracticable. The total absence of metalliferous substances in adventures of that nature is too frequent an occurrence, and may indicate nothing with respect to the eventual prospects of the trial. Nothing short of physical impossibilities would appear to form grounds for the relief in such cases. But it might be very different in searches

(*y*) Laycock *v.* Bulmer, 13 L. J., N. S., Exch. 156.

(*z*) Baring *v.* Dix, 1 Cox, 212.

for stratified substances, as coal and limestone. If any specific substances of this nature were not found, after competent trial, to exist at all in the lands, or to exist only in such a form as to render their acquisition of no value, or of a value greatly insufficient to answer the purposes of the company, a dissolution might be decreed (*a*). But the decision, in all such cases, would be guided by the intentions of the parties as expressed in their deed of settlement, or by their previous agreement; and, before a dissolution is granted, it must clearly appear that those intentions are incapable of being carried into effect (*b*).

Similar relief, by dissolution, may be obtained, in cases of partners becoming of unsound mind (*c*), or for gross breach of faith, or wilful acts of fraud, or even for reckless mismanagement and waste, or the exclusion of other partners from a share in the management, or for permanent and violent dissension (*d*).

In a case of lunacy, the lunatic's committee were allowed to bid for a mine. But he was not permitted to continue as a partner, on the demand of another partner for dissolution. It was also held, that a right of preemption acquired by that partner, in pursuance of a notice given by another retiring partner before the lunacy, was binding on the lunatic and his committee (*e*).

The consequences of a dissolution, when they are not regulated by express stipulation, are, that accounts be taken, that the partnership property should be sold, and the proceeds paid to the parties entitled, according to their

(*a*) See Hanson *v.* Boothman, 13 East, 22.

(*b*) See Waters *v.* Taylor, 2 Ves. & B. 299.

(*c*) Ibid.; Sayer *v.* Bennet, 1 Cox, 107; Mont. Part. App.; Leaf *v.* Coles, 1 De G., M. & G. 171.

(*d*) Marshall *v.* Colman, 2 Jac. & W. 200; Goodman *v.* Whitcomb, 1 Jac. & W. 592; Chapman *v.* Beach, ibid. 594; Norway *v.* Rowe, 19 Ves. 148; Waters *v.* Taylor, supra; Master *v.* Kirton, 3 Ves. 74; De Berenger *v.* Hammel, 7 Jarm. Conv. 26.

(*e*) Rowlands *v.* Evans, Williams *v.* Rowlands, 30 Beav. 302; 33 Beav. 202; 31 L. J., Ch. 265.

several shares in the concern (*f*). In the case of mines, however, it would appear that there may be a reference to the master, to inquire whether it would be for the benefit of all parties concerned in the works that the property should be sold as going works, or that they should be carried on for the purpose merely of winding up the concern. As was observed by Lord Eldon, the state of the market varied so much, that a sale, which might be beneficial at one moment, and prejudicial at another, could not be ordered without inquiry. Such a reference was accordingly ordered in the case referred to. It seems, also, by the same case, that the surviving or continuing partners would be justified in dealing with the property so as to wind up the concern ; but that in case of differences arising among them, the Court will appoint a manager (*g*). When a mining partnership is considered as actually dissolved, the Court will order a sale on motion, without waiting for a decree, a practice which would seem to apply to all partnerships (*h*).

In a bill for dissolution, all the parties, however numerous, must be parties (*i*).

In a case where two partners had exhausted a coal mine, the accounts of the partnership had been settled, with some small exceptions, and one of the partners had agreed to take the materials at a sum which was fixed by valuation ; they were delivered to him, and the other partner brought an action against him for his half: it was contended, that there had been no final settlement of accounts, and no express promise to pay a moiety of the valuation. The jury was directed to find for the plaintiff, if they were of opinion that the partnership was dissolved, and that the defendant, on taking the materials, was to pay for half

(*f*) Fereday *v.* Wightwick, 1 Russ. & M. 45.

(*g*) Crawshay *v.* Maule, 1 Swanst. 528. See Crawshay *v.* Collins, 15 Ves. 226.

(*h*) Ibid. 523.

(*i*) Deeks *v.* Stanhope, 14 Sim. 57; 13 L. J., N. S., C. C. 280.

of them. It was held, that the direction was substantially correct (*j*).

On a dissolution of partnership between several colliery owners, holding mines under different leases, one of the owners prayed for a partition. But a sale of the entirety was ordered, although there were no debts (*k*).

It has been decided, that the Joint Stock Companies Winding-up Act, 1848, now repealed, did not apply for the mere settlement of disputes between partners. The plaintiff, a shareholder, quarrelled with the other shareholders, for desiring to relinquish his share without payment of the expenses belonging to it, and they induced a creditor to sue him for the price of goods supplied to the mine. A verdict was got against him, and he served a notice under the act. Lord Cottenham, L. C., said, it was an error to use the act for settling controverted points between the shareholders and the company. There was no such object in the act. The object was on behalf of all creditors and shareholders, if a case appeared which would make it expedient that the affairs should be wound up, to make arrangements for that purpose (*l*).

The mode of winding up companies subject to the jurisdiction of the Court of Stannaries will be noticed in another chapter.

It is usual, in partnership deeds, to make particular stipulations with respect to the winding up of a concern after dissolution. The division of the stock, the collection of the debts, the mode of disposing of or valuing the concern, may all be provided for by previous arrangement. In many instances, it is advisable to prepare deeds of dissolution in which the parties may give mutual releases.

(*j*) Jackson *v.* Stopherd, 2 Cr. & M. 361.

(*k*) Wild *v.* Milne, 26 Beav. 504.

(*l*) Wyld *v.* The Wheal Lovell Company, 18 L. J., N. S., C. C. 139; 1 Mac. & G. 1; 1 Hall & T. 125.

Section III.

ON THE LIABILITIES AND DUTIES OF PARTNERS.

Having thus explained the manner in which a mining partnership may be formed and dissolved, we may now proceed to consider the liabilities and duties which will devolve upon persons in consequence of the subsistence of that relation.

It may be premised, that persons engaged in partnership for the prosecution of mining adventures will not become subject to *all* the consequences of a general partnership, but only to those incidents which are considered properly to belong to cases of *particular* partnership. It was observed in the first edition of this work, that there were many questions affecting the liabilities and duties of persons engaged in particular partnerships, which had never received very accurate discussion—and that there had been few occasions to demand a very rigid judicial examination of the principles which should govern such engagements. Several recent cases have since occurred in which this subject has been considered.

I. The law with respect to the liabilities induced by individual partners, in *all* cases of partnership, is founded upon one common principle; and having once ascertained this principle, its application may, in general, be easily determined. This principle may be thus explained:—When persons agree to unite their labour, or their capital, in the prosecution of a common object, and as a trade, it becomes necessary for the effectual carrying on of the concern, that one partner should be allowed, without the *express* consent of his co-partners, to do many acts of business which may bind the whole firm. This authority springs from that mutual confidence which is presumed to be placed in each other, and is required for their mutual advantage. For it might otherwise happen that, from temporary absence or disagreement, and many other

causes, the business of the partnership might be altogether suspended, and eventually destroyed. Such rights are also equally necessary for the protection of the public, who cannot be expected, in every case, to transact their business with the whole collected body of partners, both visible and dormant; and who are, therefore, entitled to proper facilities in their general dealings with the firm. It is obvious, however, that there must be a limit to the extent of these authorities, and that the public cannot be entitled to presume a power for any partner to do any act which he may think proper for the welfare of the concern. This would be to convert the shield of preservation into an instrument of destruction.

It is very usual, in partnership agreements, to introduce special provisions with respect to the extent to which partners may be permitted to produce a general liability. These stipulations will, of course, be binding upon all the members of the partnership (*m*). But if any of those terms are opposed to those general doctrines of the law which would have prevailed in the absence of special agreement, they will not operate to bind third persons, unless they have had notice of the existence of such arrangements (*n*). In all other cases, the limit of liability must, with respect both to the partners themselves and the public, be determined by the *general usage of trade applicable to the particular branch of industry in which the society is engaged.* An authority for one partner to bind another will, therefore, in all such cases, be presumed to exist, so far as by the general usage of persons engaged in similar pursuits, such an authority has been determined to be necessary for effectually conducting the business of the concern. In cases where usage may not have established any particular practice, or in which the custom

(*m*) Ridley *v.* The Plymouth, Devon and Stonehouse Baking and Grinding Company, 2 Exch. 711; Thompson *v.* Wesleyan Newspaper Association, 8 Com. B. 849.

(*n*) South Carolina Bank *v.* Case, 8 Barn. & C. 427; 2 Man. & R. 459.

may be doubtful, it will still be necessary to recur to the original principle upon which all such customs are founded—viz., whether the act in question can be considered to be necessary for the efficient management of the concern.

It may frequently happen, however, that the usage in any particular pursuits may not be uniform throughout the different districts of the kingdom. With respect to mines, the usage is variable in many instances. For instance, some mining districts have adopted what, we shall presently see, is the general rule of law upon the subject—that no partner can bind the firm by negotiating bills of exchange. On the contrary, in other places, and particularly in the coal and lead districts of the North of England, such an authority has been sanctioned by long and continued custom. The question of usage, therefore, must also be considered with respect to the particular place in which the mining operations are carried on. Such a usage may also, it is presumed, be established by the distinct recognition of the partners, which may amount to an express stipulation, without reference to the usage of any district, provided the written terms of the society do not prevent its adoption (*o*). But in all such cases it should be seen that the particular mode of transacting the business is sufficiently sanctioned by the usage. A departure from the usual time or terms of credit, or an extraordinary exercise of any authority allowed only to a certain ascertained extent, may expose the creditor acting in disregard of the custom to the consequences which would have resulted, if the custom had not existed at all.

It has been expressly decided, that partners in a mining adventure cannot bind each other, or authorize others to do so, by drawing or accepting bills of exchange, or by

(*o*) Ex parte Bonbonus, 8 Ves. 540; Ex parte Bowness, 2 Maul & Sel. 484; Duncan *v.* Lowndes, 3 Camp. 478; Ex parte Nolte, 2 G. & J. 295.

giving promissory notes, in the absence of stipulation or usage.

In the case alluded to, the plaintiff was the indorsee of a bill of exchange, or, as it was described in the declaration, a promissory note. The defendant was a member of the Cornwall and Devonshire Mining Company, and the instrument had been drawn by the agent, and accepted by the secretary of the company, in pursuance of a resolution of the directors. No deed of settlement or co-partnership was produced. It was observed by Mr. Justice Bayley, that, upon this point, the only question which could be submitted to the jury was, whether companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills; or whether it was absolutely necessary, for the purpose of carrying on the concern, that there should have been such a power. There was no evidence that such a power was usually vested in the directors of other companies, or that it was necessary for the purpose of carrying on such a concern. He thought such a power was not necessary for that purpose. The directors of such a company ought to take care to have ready money to answer all demands upon them. If they had not, he could not suppose that every person, who becomes a shareholder in such a company, understands that he is to be personally liable upon a bill of exchange, drawn or accepted by a director; for the effect of that would be to authorize the directors to pledge the credit and responsibility of the individual shareholders to any extent. If that was not the understanding of the shareholders, the directors could not have any implied authority to pledge the credit of the other members by drawing or accepting bills. The directors might bind themselves personally, and pledge their own responsibility, but not that of the other members. Mr. Justice Littledale said, that when the plaintiff took the bill, he had notice on the face of it that it was not an ordinary bill of exchange. It was then incumbent on him to inquire whether the

persons who drew and accepted this bill had authority, by such acts, to bind the defendant, the latter not appearing on the face of the bill to be a partner with those persons. In the case of an ordinary trading partnership, the law implied that one partner had authority to bind another by such means, because it was necessary for the purpose of carrying on a trading partnership; but it did not follow that it was necessary for the purpose of carrying on the business of a mining company. One of several persons jointly interested in a farm have no power to bind the others by drawing or accepting bills, because it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted (*p*). Even if that were necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a farm, it was incumbent on the plaintiff to have shown, either from the very nature of the company, that it was necessary, or, from the practice in other similar companies, that it was usual. Besides, this was in form a bill of exchange, drawn by the company upon themselves. It was, therefore, in effect, a promissory note. He thought it would require more evidence to show that the directors of such a company had power to bind the other members by promissory notes, than by bills of exchange (*q*).

It also sufficiently appears from the same case that, when an authority to draw or accept bills of exchange cannot be implied from the nature of the business, and is contrary to the presumption of law, it will be incumbent on the plaintiff, in any action of the above description, in which the *particular* usage of trade, or an express authority, are relied upon, to prove the existence of that authority. As was observed by Mr. Justice Bayley, in order to establish

(*p*) Greenslade *v.* Dower, 7 Barn. & C. 635; 1 Man. & R. 640.

(*q*) Dickinson *v.* Valpy, 10 Barn. & C. 128; 5 M. & R. 126; Earl of Macclesfield *v.* Baddeley, 7 M. & W. 570; Thompson *v.* Universal Salvage Company, 1 Exch. 694.

a liability, it ought to have been made out affirmatively, on the part of the plaintiff, that this was a company in which the directors were authorized to bind the other members by drawing and accepting bills (*r*).

In another case, the partnership deed stipulated that the resident managing director of the mine should employ workmen, provide materials and machinery, and direct the workings according to the terms of the lease, subject to instructions from the other directors—that he should transmit monthly account of ores raised, sums expended, of debts and liabilities, and should not expend or engage the credit of the company for any sum beyond 50*l.* in any one month, without express authority in writing from the directors. It was held, that the manager could not bind the company by accepting bills of exchange (*s*).

But a partner may be made liable, on bills of exchange, by his own conduct in any particular transaction. Thus, in a case where the defendant and three others had agreed by parol to form a mining company, and the mine was carried on accordingly, a bill drawn on the company was accepted by him as manager in his own name. It was held, that he was liable as a member of the company, although he professed to have authority which he did not possess (*t*).

In another case, it was stipulated in a deed of partnership of a colliery company, that if any of the partners should for any other purpose than the immediate use of the partnership draw or accept any bill of exchange in the name of the firm, the others might dissolve the partnership. There were also other special stipulations for increase of capital, and for meeting deficiencies by contributions from the partners. The solicitor to the firm paid

(*r*) See Thicknesse *v.* Bromilow, 2 Cr. & J. 425.

(*s*) Brown *v.* Byers, 16 M. & W. 252; 16 L. J., N. S., Exch. 112. See Heraud *v.* Leaf, 5 Com. B. 157; 17 L. J., N. S., C. P. 57.

(*t*) Owen *v.* Van Uster, 20 L. J., N. S., C. P. 61; Healey *v.* Story, 3 Exch. 3.

some partnership debts at the request of the managing partners, and on their promise to give a bill in the name of the firm. The bill was afterwards given—and the other partners had full previous knowledge of the intention to raise money. It was held, that the other partners were liable, either on the bill, or for money paid to their use (*u*).

A bill of exchange, directed to a mining agent, who was also a partner, was accepted by him in his own name, by procuration, on behalf of the company. He stated at the time of acceptance, that he would not be personally bound. He had no power from the company to accept bills. It was held, that though he could not accept for others, he bound himself as principal (*x*).

In another case, where the agent was not a partner, and had not signed by procuration, but only for the company, he was held to be personally liable (*y*).

In another mining case, the deed of association authorized the directors to create and issue new shares. They borrowed money to meet bills of exchange drawn on the company by their agent in America. In an action for this loan, it appeared that one of the shareholders had not signed the deed, nor had done any other act, except attending a special general meeting, at which resolutions were passed relating to the sale of the mines, in order to provide for the bills of exchange. This was held to be sufficient evidence for the jury to fix him with the liability, and that his attendance showed sufficient authority in the directors to enter into the contract on his behalf (*z*).

A notice to admit a bill in evidence was given by defendant partners. The bill was described as accepted by an agent for them. It was held, that they could not

(*u*) Brown *v.* Kidger, 3 Hurl. & N. 853; 28 L. J., Exch. 66.

(*x*) Nicholls *v.* Diamond, 9 Exch. 154; 23 L. J., N. S., Exch. 1.

(*y*) Mare *v.* Charles, 5 E. & B. 978; 25 L. J., Q. B. 119.

(*z*) Harrison *v.* Heathorn, 6 Man. & G. 81; 12 L. J., N. S., C. P. 282; The Sheffield Railway Company *v.* Woodcock, 7 M. & W. 574.

afterwards dispute the authority of the agent to bind them (*a*).

But it is expressly decided, that without specific sanction there is no power to borrow money, or overdraw bankers' accounts, even for the most urgent occasions of the mine.

A mining adventure has been often likened, as to liability, to ships. But it has been held, that no sudden emergency will give any implied authority to an agent to raise money and pledge the credit of a company for its repayment. Thus, in a case in Cornwall, where the mining wages were in arrear, and the workmen procured distress warrants on the materials of the mine, it was held, that the agent, in order to prevent execution of the warrants, had no right to borrow in the name of the company, and without their knowledge, a sum for payment of the wages, and that the company were not liable without express authority. It was contended, that the agent was like the master of a ship, who had an implied authority to borrow money on the credit of the owners, if it be necessary for the prosecution of the voyage, and who may even pledge the vessel itself. But Parke, B., said that such a power was confined to the master of a ship, and to the acceptor of a bill of exchange, who accepts a bill, to save the honour of the drawer. The latter derived its existence from the law of merchants, and in the former case, the law, which generally provides for ordinary events, and not for cases of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, to get the vessel repaired, to pledge the credit of the owners, and therefore it invests the master with power to raise money, and by an instrument of hypothecation to pledge the ship, if necessary. If the cases were analogous, the agent would have power to mortgage the mine itself. The authority might have been given, but there was no

(*a*) Wilkes *v.* Hopkins, 14 L. J., N. S., C. P. 225.

evidence of that, and there was no general authority to that effect (*b*)

It may be observed, that the authority of a mining agent is more like that of the agent or acting partner called the "ship's husband" (*c*), and that the mine owners resemble also the part-owners of a ship, which is held by them as tenants in common, and who can only dispose of their own shares (*d*).

In another case, under the cost-book system, one of the largest shareholders had taken the entire control of the affairs of the mine, and had opened an account with bankers, which was greatly overdrawn. He was not the managing agent. The bankers proceeded against the other partners. But it was held, there was no implied authority to pledge the credit of the company in that way. Lord Truro, C. J., said, that only certain individuals had the management of mining companies, and, if one partner had the power, independently of management, to bind his co-partners, it would be inconsistent with carrying on the mine. Any express authority was negatived, and there was no evidence of usage to that effect (*e*).

This authority to borrow money may be enforced by the deed of settlement, but it will not be presumed from any general expressions of confidence. Thus, a deed contained a clause, that the affairs of the company should be under the sole control of the directors, and that three of them should for all purposes be competent to act. There were also powers to create new shares, and to alter the provisions of the deed by the vote of a special general meeting, called at the instance of the directors. Large sums were borrowed by the directors from a bank for the purposes of the mines. For several years these loans were entered in

(*b*) Hawtayne *v.* Bourne, 7 M. & W. 595; 9 L. J., N. S. Exch. 224.

(*c*) Abbott on Shipping, p. 96.

(*d*) Sims *v.* Brittain, 4 Barn. & Ad. 375.

(*e*) Ricketts *v.* Bennett, 4 Com. B. Rep. 686; 17 L. J., N. S., C. P. 17.

the books of the company, and appeared in the annual reports. It was held, that the general words and purport of the deed confined the concern to carrying on the mines by the large capital to be subscribed, and that the directors, with full control over this capital, had no power to borrow more (*f*).

But it is clear that the credit of a company may be pledged for wages and for articles supplied, at the instance of *managers*, for the purposes of the mine. Thus, a company was formed in which the defendant took shares. Only two-thirds of the shares were taken. The defendant had never been at the mine, nor had attended any meetings; but he had signed, with other shareholders, two letters, requesting the directors to remove one of their body. The defendant was made liable in an action for goods ordered for the necessary occasions of the mine. Parke, B., said, the sole question was, whether there was evidence that the defendant gave authority to the directors to pledge his credit to the plaintiff. If the case had stood merely on the fact of his being a shareholder, he should have thought it was not sufficient. But the letters showed he knew that directors were acting, and that he was taking a personal interest in the concern; and they were evidence of authority given to the directors to do what they did for his benefit. Whether he was deceived as to the amount of capital or not, there was proof he authorized the directors to do what is usually done, and if they dealt usually on credit, then he authorized them to do so. Either he knew it, or, not knowing it, chose to authorize the directors to proceed (*g*).

Neither can this right to incur debts for goods be restrained, as against a creditor, by any private stipulation,

(*f*) Burmester *v.* Norris, 21 L. J., N. S., Exch. 43. See The Vale of Neath and South Wales Brewery Joint-Stock Comp., Ex parte Lawes, 1 De G., M. & G. 421; 21 L. J., C. B.

C. 688; Maclae *v.* Sutherland, 23 L. J., N. S., Q. B. 229; 3 E. & B. 1.

(*g*) Tredwen *v.* Bourne, 6 M. & W. 461; 9 L. J., N. S., Exch. 290.

unknown to him, between the partners. Thus, a partner had agreed with the directors of a cost-book company, that they should not deal on credit. The creditor had no knowledge of this. It was held, that the partner was not exempted from liability. The Court said, that any single partner is a general agent for another, as to all matters within the scope of the partnership dealings, and he has all authorities necessary for carrying on the partnership, and all such as are usually exercised in any business in which they are engaged. Any restriction by agreement is operative only as between the partners themselves, but does not limit the authority, as to third persons who acquire rights by its exercise, unless they know of such restriction (*h*).

In a recent important case of a company (*i*), where the original capital was spent, new shares were created according to the deed of settlement. The wages of the miners fell into arrear for want of funds, debts were contracted, and proceedings commenced in the German Mining Courts against the mines by miners and creditors. The directors induced several shareholders to advance funds out of their own resources, which were duly applied. It was held, that in winding up the company, these advances should be allowed to be set off against the calls made on the shareholders as contributories. Turner, L. J., said, that the acting manager of a mine, whether shareholder or not, had no power to borrow money for any necessary purpose, even for preserving the mine. But the cases had established a distinction between monies borrowed and debts contracted. The distinction was this: it was not according to the usual course of business to borrow money, and, therefore, the lender must look to the power of borrowing, and may recover over against the parties giving the authority. But

(*h*) Oatey *v.* Bourne, Hawkin *v.* Bourne, 8 M. & W. 703; 10 L. J., N. S., Exch. 361.

(*i*) In re The German Mining Company, 2 Eq. Rep. 983; 22 L. J., N. S., C. C. 926.

the shareholders are considered to have authorized the manager to incur expenses and debts for wages and goods. It would be unjust to make the shareholders liable for money borrowed without their authority, for they would be liable whether the loans were expended on the mine or not. But there was no injustice in making them liable for wages and debts of which they derived the benefit. The general shareholders would have been liable to the miners and creditors. But there was another ground for the decision. These companies were only partnerships, composed of a large number, but subject to the same rules as ordinary partnerships, except so far as the nature of the undertaking or the number of partners might modify those rules. In ordinary partnerships, the partners must bear the losses in proportion to their interests. No modification was necessary with respect to expenses and debts of that kind. All the partners were liable. The effect of the number of partners was only that the company must act by directors who were trustees. In case of breach of trust the loss must fall on them, but in other respects the general liability remains unaltered. The directors in this case had full power to continue the mines, and the expenses should fall on the shareholders generally. The engagements of a partnership of that kind cannot be measured by the extent of the capital. The deed must be construed like other partnership deeds. New undertakings were not to be entered into after the full capital had been embarked. Was the concern to be stopped at the moment when the expenditure equalled the capital? That moment could not be ascertained (*k*).

In the above case, it was also decided that interest should be allowed on the advances. It was held by Knight Bruce, L. J., that in all cases where a partner has properly advanced money for the benefit of the partnership, even though without the sanction or knowledge of the

(*k*) In re The German Mining Company, supra.

other partners, interest was payable according to general mercantile usage. Turner, L. J., agreed to the allowance in this case, but he doubted in laying down any general rule on the subject.

After the order had been made to wind up the affairs of the company, the Court had directed an action to be brought by the bank of the company for money borrowed. This action was brought in the Court of Exchequer (*l*), which was of opinion that the loan could not be treated as a charge against the company, but only as a personal liability of the borrowing shareholders. The claim of the bank was then discharged, and the borrowing partners repaid the money out of their own funds, and then claimed the amount as advances made for the company. The claim was allowed by the Master and Stuart, V. C., and also on appeal to the Lords Justices. It was proved, that the money borrowed had, like the other sums advanced, been applied to the necessary purposes of the mines. Turner, L. J., said, that although directors were agents, and could not bind these companies beyond the limits of their authority, they were also trustees, and were thus entitled to be indemnified against expenses duly incurred by them in the execution of the trust. It made no difference whether the money was originally advanced, or was first borrowed and then repaid. This was consistent with the want of remedy of the lenders against the company. The right to indemnity was incident to the office of all trustees, and any provision to the contrary must be clearly expressed. It was argued, that the directors should have conducted the business with proper reference to the capital. But the expenses of such a concern could not be foreseen, and the deed of settlement showed that the partners looked to the produce of the mines as a fund to meet the expenses. How were the expenses to be met if the produce was insufficient? The directors were not bound to

(*l*) Nom. Burmester *v.* Norris, cited supra.

call a meeting of the shareholders if they thought the advances would establish the company on a sound footing. They could not be charged for a mere error in judgment, especially when a discretion is reposed in them. Besides, the shareholders, who knew of the advances from the annual reports, might have called a meeting for dissolution (*m*).

In another case, a mining company had been established under the "Joint-Stock Companies Act, 1844," with certain borrowing powers, to be exercised by the authority of a general meeting. One of the directors had irregularly advanced money to meet necessary expenses. No previous sanction of the general shareholders had been procured—but the advances appeared in the reports and balance-sheets, which were approved at general meetings. The company was afterwards registered as a limited company, and was voluntarily wound up. It was held, that the director was entitled to rank as a creditor of the company, and to be paid next after the general creditors (*n*).

In another case, the banking account was kept in the name of five directors. Other directors who had interfered in the management were held to be liable (*o*).

When a company has sanctioned the transfer of shares, and recognized the transferee, they cannot claim from him any calls which ought to have been paid by the former owner—even when the transferee is only a mortgagee (*p*).

Shareholders cannot, by any agreement among themselves, authorize a manager to recover calls from defaulters

(*m*) In re The German Mining Company, 24 L. J., N. S., C. C. 41; 2 Eq. Rep. 983.

(*n*) Lowndes *v.* The Garnett and Moseley Gold Mining Company of America, Limited, 2 Johns. & H. 282; 33 L. J., Ch. 418.

(*o*) Johnson *v.* Goslett, 18 Com. B. 728; 3 Com. B. (N. S.) 569; 25 L. J., C. P. 274; (in error) 27 Ib. 122.

(*p*) Watson *v.* Eales, 23 Beav. 294; 26 L. J., Ch. 361.

in an action at law. There is no privity of contract, and no consideration (*q*).

But when any liability between partners is sufficiently separated from the general partnership liability, an action at law may be maintained. Thus, three mining partners had joined in a promissory note, which was discounted and applied for the purposes of the mine. One of them paid the whole amount—and he was allowed to recover against the other two partners (*r*).

In cases of express stipulation it should also be seen, that the bill is drawn or accepted in the form, and by the persons mentioned in the deed of partnership. The agents of a company have no implied authority to do such acts, —and the authority may be confined to the directors, the secretary or some other specified persons. It should, in such cases, therefore, be distinctly shown, that the person exercising such an authority has had that authority duly conferred upon him.

When an agent is properly authorized, he should exercise his power, not in his own name merely, but on the behalf of the partnership. In one case, a bill was drawn upon bankers who were directed to place the amount to the account of the Chilian and Peruvian Mining Association. The bill was signed by the agents with their own names only, and was countersigned by the secretary. It was held by Lord Tenterden, that, supposing the agents had authority to bind the defendant by their bills, they had not done so in this case, inasmuch as they had drawn the bill in their own names, and not as agents (*s*).

A negotiable security should also be correctly signed under the style of the firm, or at least in such a manner as to show distinctly that the partner intended to bind the firm, and not himself personally only. Thus, in the case of

(*q*) Hybart *v.* Parker, 4 Com. B. (N. S.) 209; 27 L J., C. P. 120.

(*r*) Sedgwick *v.* Daniell, 2 Hurl. & N. 319; 27 L. J. Exch. 116.

(*s*) Ducarry *v.* Gill, 1 Mood. & M. 450; 4 Car. & P. 120.

a promissory note signed for "The Newcastle Coal Company," instead of "The Newcastle and Sunderland Wallsend Company," and made payable at a place where the company had no account, it was held, that the note did not bind the other partners (*t*).

It is clear from the preceding decisions, that the managing partner of a mine is presumed to possess, within the prescribed limits, full powers for binding the other partners. The same powers are vested in the manager or agent, in cases where he is not a partner; for he is the delegated representative of all. His authority may be enlarged by stipulation, or by particular usage (*u*), recognized by the partners, but it cannot be limited by private contract among the partners, unless the creditor has knowledge of the restriction. It may also be stated, as a general rule, that, in mining partnerships composed of many persons, not strictly founded on the *delectus personæ*, a non-managing partner will have no general implied power to bind the rest, even for the most necessary occasions of the mine; and that all the powers of that kind may be said to spring from the management (*x*). Even in partnerships existing under the *delectus personæ* the authority may be confined to the management. In all these cases, the inquiry of the creditors should be directed to the fact of agency or management, which may be established either by direct appointment of the company or by sufficient recognition of notorious acts.

But there are mining concerns which are carried on by partners, few in number, subject to mutual selection, and therefore more closely connected by mutual confidence. In such cases, all or most of them may be actually engaged in the transactions of the mining affairs. There may be often no difference between firms of this kind and those engaged in any other distinct business as general

(*t*) Faith *v.* Richmond, 11 Ad. & Ell. 339.

(*u*) Houghton *v.* Mathews, 3 Bos. & P. 489.

(*x*) Ricketts *v.* Bennett, supra.

partners; and those who are not working partners may not be the less liable to the general consequences of such a partnership.

On the other hand, a partner, not usually engaged in the management, may have an implied authority to bind the firm. It might have been thought, even in these cases, that a distinction might have been observed between those partners who were actually engaged in the management of mines, and those who tacitly depended upon that management for the success of the undertaking; and that the ostensible and active managers only would be held capable of involving the credit of the whole firm. Relief might, of course, be obtained on the ground of fraud and collusion between a creditor and a non-managing partner. If the latter used the effects or credit of the firm for his own separate purposes as to secure a private debt, there would be sufficient ground for setting aside the transaction (*y*). If a mining firm of this kind has several sleeping partners, a creditor would be frequently liable to the imputation of fraud or of such gross negligence, as to amount to a fraud, in transacting the business of the firm with a non-managing partner (*z*). Such transactions would, therefore, seem to require great caution, even when the partner is not acting in respect of a separate debt or liability. But, under proper circumstances, it is conceived, the general law must prevail. The public are to be protected in their dealings with a partnership firm, and they cannot be expected to inquire, on every particular occasion, whether the partner so assuming to deal with or charge the partnership property has obtained the acquiescence of his fellow adventurers, or what changes take place, from time to

(*y*) Arden *v.* Sharpe, 2 Esp. 524; Hope *v.* Cust, 1 East, 53; Shirreff *v.* Wilks, 1 East, 48; Green *v.* Deakin, 2 Stark. 347; Jones *v.* Yates, 9 Barn. & C. 532; Ex parte Goulding, 2 Glyn & J. 118; Snaith *v.* Burridge, 4 Taunt. 684.

(*z*) Baker *v.* Charlton, Peake's Rep. 80, 81; Sutton *v.* Gregory, Peake's Add. Ca. 150. See South Carolina Bank *v.* Case, 8 Barn. & C. 427.

time, in the management of the mines, or in the conduct of the business. A creditor must be cautious, but he need not be curious. He must have ordinary prudence. Again, those who seek the advantages of partnership must abide by its inconveniences, and must endeavour to protect themselves by known stipulations.

In this condition, and subject to the above remarks, any of the partners may purchase or sell goods (*a*), or pledge the partnership property (*b*); and, in general, the acknowledgment (*c*), promise (*d*) or undertaking (*e*) of any one will bind the rest; and a partner will also be liable to the consequences of an act of fraud upon other persons committed by his co-partner (*f*), even if the act of fraud amounted to a felony (*g*).

But all such acts must be done with reference to business transacted by the firm, or to the contracts of the partnership (*h*); and the act of one partner will not bind the firm, if the creditor received a previous express warning from the other partners, that they would not consider themselves responsible; for the authority of a partner is only implied (*i*).

With respect to the limits of responsibility as to time, a partner will not, except under peculiar circumstances, be liable for debts contracted by the firm before his connection with it (*k*). On the other hand, in general partner-

(*a*) Hyatt *v.* Hare, Comb. 383; Fox *v.* Hanbury, Cowp. 445.

(*b*) Raba *v.* Ryland, Gow. N. P. C. 132; Reid *v.* Hollinshead, 4 Barn. & C. 867.

(*c*) Cheap *v.* Cramond, 4 Barn. & Ald. 663.

(*d*) Lacy *v.* M'Neil, 4 Dowl. & R. 7; Pittam *v.* Foster, 1 Barn. & C. 248.

(*e*) De Tastet *v.* Carrol, 1 Stark. 88.

(*f*) Bond *v.* Gibson, 1 Camp. 185; Swan *v.* Steele, 2 Esp. 523; Lacy *v.* Woolcott, 2 Dowl. & R. 458; Rapp *v.* Latham, 2 Barn. & Ald. 795.

(*g*) Stone *v.* Marsh, Ryan & Moo. 364; 6 Barn. & C. 551; 8 Dowl. & R. 71; Ex parte Bolland, Mont. & Mac. 391.

(*h*) 2 Barn. & Ald. 679; Wood *v.* Braddick, 1 Taunt. 104.

(*i*) —— *v.* Layfield, 1 Salk. 292; Gallway *v.* Matthew, 10 East, 264; Willis *v.* Dyson, 1 Stark. Rep. 164; Vice *v.* Fleming, 1 You. & J. 227.

(*k*) Shirreff *v.* Wilks, 1 East, 48; Catt *v.* Howard, 3 Stark. 5.

ships, a retiring partner will continue liable for debts subsequently contracted, unless he give notice of his ceasing to be a partner (*l*). Notice of dissolution inserted in the Gazette will be sufficient with respect to all parties who have not previously dealt with the firm (*m*). But express notice must be given to the original creditors of a firm (*n*); and it is usual to address circulars to all the correspondents of the firm.

Questions of notice are facts to be submitted to a jury. In a mining case, an action was brought against a shareholder of a mine for the amount of a partnership debt. The defendant, it appeared, had told the creditor that he had disposed of his share to others, who would in future be the paymasters, and that he would no longer be responsible. It was held, that the operation of the notice was a question for the jury (*o*).

A mining partner may in many cases be considered to be a dormant partner. In such cases, he will be responsible for all the contracts during the time of his partnership, but not for contracts entered into after his retirement without notice, for third persons have never trusted upon his credit (*p*).

It has been held, that if, in contemplation of bankruptcy or insolvency, a partner retires from the firm, such an act will exempt him from future liability, if it be a *bonâ fide* transaction, and done without the fraudulent collusion of the other partners. This has been expressly decided with respect to mines, and it makes no difference if his share is disposed of to needy and irresponsible persons.

In this case, the plaintiff and a person named Guppy and others were partners in a mine. Guppy, finding that

(*l*) Parkin *v.* Carruthers, 3 Esp. 248; Stables *v.* Eley, 1 C. & P. 614.

(*m*) Godfrey *v.* Turnbull, 1 Esp. 371.

(*n*) M'Iver *v.* Humble, 16 East, 169.

(*o*) Vice *v.* Fleming, 1 You. & J. 227.

(*p*) Brooke *v.* Enderby, 2 Brod. & B. 71; 4 Moo. 501; Carter *v.* Whalley, 1 Barn. & Ad. 11; Heath *v.* Sanson, 1 Nev. & M. 104.

the concern was proving ruinous, agreed to assign his shares to a person who was admitted not to be in opulent circumstances. This person afterwards assigned half of the shares to another person who was admitted to be in indigent circumstances. Guppy gave notice to the plaintiff that he had assigned his shares, and that, as to him, the partnership was at an end, and the style of the firm was changed, but not so as expressly to include the new partners. The plaintiff refused to recognize those persons as partners, and filed his bill for a dissolution, an account, and an arrangement of the rights of the parties. It was held by Lord Lyndhurst, then M. R., that Guppy had ceased to be a partner from the time of notice. He observed, it was said that the assignment was colourable, that is, that it was made for the sake of securing the assignor from future liability. If he made it with that view, he had a right so to protect himself from future liability.—It was alleged, that the assignee was not a responsible person.—Let it be so.—Guppy, for the purpose of securing himself, had a right to assign to a person not responsible. The only ground of objection would be, that, though there was an assignment in form, there was an understanding between the parties that the assignee should be a trustee for the assignor. There was no pretence for such a supposition in that case. He must hold, therefore, that, at all events, the assignment, coupled with the notice, freed Guppy from future liability (*q*).

In all such cases, the shares must be sold *bonâ fide*. Any colourable transfer will not be sufficient (*r*). Any suspected trust will be minutely investigated. But it is not material that the vendor knows that a company is in difficulties (*s*), or that money has been actually paid for the transfer of the shares by the transferor, or that the

(*q*) Jefferys *v.* Smith, 3 Russ. 158. See also Parker *v.* Ramsbottom, 3 Barn. & C. 257; 5 Dowl. & R. 138; Taylor *v.* Shum, 1 Bos. & P. 21.

(*r*) Ex parte Budd, 31 L. J., Ch. 4.

(*s*) Ex parte De Pass, 4 De G. & J. 544; 28 L. J., Ch. 769.

transfer states falsely the payment of money by the transferee (*t*).

A proprietor, under the cost-book system, had transferred several of his shares to persons, who had taken no part in the affairs, and had paid no calls, for the purpose of raising the value of the shares in the market. It was held, that he was liable for the whole of the shares transferred, as well as for those retained (*u*).

When a company has been actually formed, and the shares have been taken, a shareholder cannot be freed from any liabilities of the company on account of any false representations made by directors on its formation (*v*). But he may maintain an action against the directors—and it is not necessary to show any direct personal representation (*x*). He cannot claim relief against other shareholders in respect of shares fraudulently issued by directors (*y*). Nor can he maintain an action against directors for money had and received for his use (*z*).

II. It is unnecessary to say much upon the general duties of a partner.

Honesty and upright dealings are especially required in all transactions between parties. The conduct of a partner shall correspond with the confidence reposed in him. It was a Roman maxim, *In rebus minoribus socium fallere, turpissimum est* (*a*). This maxim is so strictly adopted and enforced by our law, that no partner is allowed even to put himself in a situation which gives him a *bias* against the discharge of his duty. Thus, in a case where two persons had entered into partnership for dealing in calamine stone, or lapis calaminaris, one of them, a shopkeeper, was to

(*t*) In re The Hafod Lead Mining Company, 35 L. J., Ch. 304.

(*u*) Wheal Emily Mining Company, Cox's case, 33 L. J., Ch. 145.

(*v*) Henderson *v.* The Royal British Bank, 7 El. & B. 356; 26 L. J., Q. B. 112; Overend, Gurney & Co., Limited, Re Oakes, 36 L. J., Ch. 233.

(*x*) Clarke *v.* Dickson, 6 Com. B. 453; 28 L. J., C. P. 225.

(*y*) Ex parte Grisewood, 4 De G. & J. 544; 28 L. J., Ch. 769.

(*z*) Clarke *v.* Dickson, 27 L. J., Q. B. 223; E. B. & E. 148.

(*a*) Cicero pro Roscio, cap. 40.

take an active part in the concern, and to purchase the mineral from the miners, in whose neighbourhood he lived. Many of the miners were in the habit of dealing at his shop, receiving from him ready money for the stone, and paying for their shop goods afterwards, as they would have done to any other shopkeeper. But, in the year 1817 or 1818, owing, as he alleged, to the distress of the times, a new course of dealing took place; instead of paying the miners for the mineral with money, he paid them with shop goods, and in his account with his partner he charged him as for cash paid, to the amount of the price of the goods. Sir John Leach, V. C., decreed an account of the profit made by him in his barter of goods, and declared the other partner to be entitled to an equal division of that profit (*b*).

In another case the defendants had issued a prospectus, with an account of the proposed capital and shares, the names of the directors and other officers, and announcing the prospect of immediate benefits from mines in actual working. A great many shares were applied for, but only a limited number was allotted, the defendants intending, as was alleged in the bill, to keep the other shares, and make a profit for themselves, and if not, to reject them. The plaintiffs, having become holders of some of the issued shares, discovered that some of the persons named in the prospectus as directors had never acted, and had been entire strangers to the enterprise, and yet had assumed power to admit the other defendants as directors. The defendants had spent much money in the mines, though disposing only of part of the shares. There was no deed. The defendants refused to take the reserved shares. It was held, that they were liable for the money paid by the plaintiffs as having been got by fraud, and for a purpose not carried out (*c*).

(*b*) Burton *v.* Wookey, Madd. & Geld. 367. But see Glassington *v.* Thwaites, 1 Sim. & Stu. 133.

(*c*) Blain *v.* Agar, 1 Sim. 37; 2 Sim. 289. See Aspitel *v.* Sercombe, 5 Exch. 147; Jarrett *v.* Kennedy, 6 Com. B. 319; Chaplin *v.* Clarke, 4 Exch. 403.

Section IV.

THE PARTNERSHIP PROPERTY.

All partners in mining adventures are, of course, entitled to the mines and their produce, and to the general partnership property, in the several proportions which have been respectively agreed upon. These rights, however, are subject to the claims of any of the partners in respect of money advanced by them for the prosecution of the adventure, or on any other account which may justly render them the creditors of the concern (*d*). It is a general rule of law, that every creditor partner has a specific lien for his debt upon the partnership property (*e*).

The shares of every trading partner constitute personal estate, and devolve, on the death of each partner, upon his personal representatives, in accordance with the well-known rule—*jus accrescendi inter mercatores locum non habet.* The same principles are equally applicable, if freehold or copyhold estates are acquired by the partners out of the common funds, when the acquisition, as in the case of mines, is necessarily connected with the nature of their business, or the lands are used for the purposes of the society. In all such cases the executor or administrator will prevail, in equity, against the heir at law (*f*). Lands also acquired by a partner from his private resources may be declared partnership property, and will become personal property if there is an agreement that the estate shall be sold upon the dissolution (*g*). But if freehold estate is acquired by a partnership, even out of the funds of the

(*d*) In re The German Mining Company, 24 L. J., N. S., C. C. 41; 2 Eq. Rep. 983.

(*e*) West *v.* Skip, 1 Ves. 142; Ex parte Ruffin, 6 Ves. 119.

(*f*) Darby *v.* Darby, 3 Drew. 495; 25 L. J., Ch. 371.

(*g*) Townshend *v.* Devaynes, 1 Mont. Part. App. 96; 1 Rop. Husb. and Wife, 346, n.; Crawshay *v.* Maule, 1 Swanst. 521; Selkrig *v.* Davies, 2 Dowl. 230; Fereday *v.* Wightwick, 1 Russ. & M. 49; Phillips *v.* Phillips, 1 Myl. & K. 649; Broom *v.* Broom, 3 Myl. & K. 443.

firm, for other purposes than those of the firm, and as a simple investment (*h*), or if lands are declared to be liable to partnership purposes for a definite period, commensurate, for instance, with the duration of the partnership term, and the purchase monies are not paid out of the funds of the firm, but from what is *brought* into the common stock (*i*), no conversion will, on a dissolution, take place, unless it is authorized by the express stipulation of the parties (*k*). There is no survivorship with respect to partnership chattels, even at law (*l*).

If real estate is purchased with the funds of the partnership, and is conveyed to one of the partners under a specific agreement that the estate shall be his own, subject to the payment of the purchase money to the firm, the lands will become the separate property of the partner acquiring them, and subject to the usual incidents (*m*).

If lands or mines are acquired in the name of one partner only, he will be held to be a trustee for his co-partners according to their respective interests in the concern.

Thus, John Burden and three other persons were partners, conducting the business of the Commercial Bank, at Newcastle, in the year 1790. In June, 1790, a lease of a colliery, called Hebburn, was granted to Burdon and three other persons, Peareth, Wade, and Wren, for thirty-one years as tenants in common, in equal fourth parts. Burdon died in 1792, and a bill was filed by two of his bank co-partners against his executors, praying that it might be declared that he took and held his one-fourth part of the colliery on account of himself and the bank partners, and for an assignment of the share accordingly. Several letters and accounts were produced as evidence to prove that he had considered himself as holding this share in

(*h*) Bell *v.* Phyn, 7 Ves. 453; Randall *v.* Randall, 7 Sim. 271.

(*i*) Thornton *v.* Dixon, 3 Brown, 199; Balmain *v.* Shore, 9 Ves. 500; Cookson *v.* Cookson, 8 Sim. 529.

(*k*) Ripley *v.* Waterworth, 7 Ves. 425; 2 Hov. Supp. 57.

(*l*) Buckley *v.* Barber, 6 Exch. 164; 20 L. J., N. S., Exch. 114.

(*m*) Smith *v.* Smith, 5 Ves. 189.

trust for himself and the other bank partners. Lord Alvanley, M. R., decided that such a partnership in the share had been fully proved; and that, as there was a sufficient declaration of trust in writing to satisfy the seventh section of the Statute of Frauds, Burdon must be declared as a trustee for himself and the other partners of the bank. The case was afterwards argued, on appeal, before Lord Rosslyn, who also held, that a partnership in the fourth share had been distinctly proved; and that, as *partners*, the parties were entitled to the colliery without reference to the Statute of Frauds (*n*). He observed, there was merely an agreement to share profit and loss in the trade of a colliery, which did not at all affect the ownership of the land, which is often carried on for a great number of years without any estate in the land given to those who are to share the profits. It was, therefore, merely the case of an engagement, which might or might not be within the fourth section of the statute; and this particular case was not even within the fourth section, because it was to be executed immediately. But such agreements might be, and were daily, proved for and against the parties entering into them by any fair, competent and credible evidence—papers unsigned, not in the form required by the statute, were the best species of evidence; parol declarations were admissible, and, if clear, consistent and intelligible, would prevail (*o*).

It has also been held, that if the renewal of a lease has been obtained by any of the partners, with a view to preclude any other partners from sharing in the benefit of the renewal and in contemplation of a dissolution, the lease renewed under such circumstances of bad faith will be considered as having been obtained in trust for the existing partnership.

In the case referred to, the plaintiff and defendant had

(*n*) See Dale *v.* Hamilton, 5 Hare, 369; 16 L. J., N. S., C. C. 126, 397.

(*o*) Forster *v.* Hale, 3 Ves. 696; 5 Ves. 308. See also Norway *v.* Rowe, 19 Ves. 158.

been partners at will in the manufacture of glass, and in a freestone quarry. The defendant's son was afterwards admitted into the partnership, and he and his father obtained a renewal of the lease in their own names only, and without communicating the fact to the plaintiff, who, on the same day, received notice of their intention to dissolve the partnership. Sir William Grant, M. R., said, it was clear that one partner cannot treat privately, and behind the backs of his co-partners, for a lease of the premises where the joint trade was carried on, for his own individual benefit; if he does so treat, and obtains a lease in his own name, it is as a trust for the partnership, and that a renewal must be held to have been so obtained (*p*).

In another case, six persons carried on coal mines, as partners, from the year 1828, under a lease granted to all of them for twenty-one years. In 1836, one of the partners died, and his widow, the administratrix, became a partner, and so continued till the expiration of the lease in 1849. In 1845, two of the partners had obtained on their own account, and without notice to the other partners, a reversionary lease of the mines. In May, 1849, these two dissolved the partnership by written notice, and called for a sale of the common stock. On a bill being filed by the widow, it was held, that she had an interest in the renewed lease, and a receiver of her share was appointed (*q*).

It was stated in the argument, in the above case, that there was no concealment from the lessor, and that he refused to treat with the defendants except for an exclusive grant to themselves.

But when there has been no specific stipulation as to what constitutes partnership property, and there have been no acts from which any contrary intention might be presumed, the partners will, on dissolution, preserve the property they have respectively brought into the joint concern,

(*p*) Featherstonhaugh *v.* Fenwick, 17 Ves. 298. See Pitt *v.* Williams, 2 Ad. & Ell. 419.

(*q*) Clegg *v.* Fishwick, 19 L. J., N. S., C. C. 49; 1 Mac. & G. 294.

and any renewal of a lease in the name of the original lessee will be for his own benefit.

A lessee was entitled to two seams of coal, called the upper and lower seams, and took his colliery agent or viewer into partnership for the purpose of working the upper seam, as a distinct concern. There were no articles of partnership. About three years afterwards, the lease expired, and the lessee procured a renewal of the lease in his own name, as before. The partnership continued, and both partners incurred a large expenditure, from the commencement of the partnership, in works for the upper seam, and also in sinking a pit for other coal, which was only just completed when the lessee filed a bill for dissolution, and claimed the exclusive benefit of the lease. The other partner stated, in his answer, that he incurred the expenditure on the faith that the partnership was to continue during the renewed term, as well as for the first term, unless dissolved by consent. But he could not prove any agreement to this effect; and it was therefore held, that the lease did not form part of the partnership property. The lessee was precluded, on appeal, from introducing a new article of partnership relating to a tentale rent to be paid to him (*r*).

In taking the accounts in the above case, it was held, on the appeal, that the stock and plant were not to be taken at a valuation, as belonging to a current concern, but sold; as the plaintiff was not bound to carry it on. It was also declared, that the defendant was entitled to an allowance for the expenditure in sinking the new pit, which was for the benefit of the lessee-partner, and who was considered to have had sufficient knowledge of the expenditure and of its purpose. The mode of estimating that allowance was not decided, as the parties agreed to a decree in accordance with the decision on the appeal, before the minutes were drawn up.

(*r*) Burdon *v.* Barkas, 3 Giff. 412; 31 L. J., Ch. 521.

In these cases, as in many others, any undue or unreasonable delay will operate as a bar to equitable relief.

Several partners had worked coal mines in freehold and copyhold lands under two leases. In 1818, an agreement was made between the surviving lessees under both leases, to become partners for the residue of the term granted by the freehold lease, viz., to November, 1831; with stipulations, that any new or renewed lease of any of the mines of the township, procured by any one or more of the partners, should enure for the benefit of all of them, and against the introduction of new partners, except by way of purchase. In 1825, the lessor procured a grant of a reversionary lease of the copyhold mines in the township for twenty-one years, and in 1829 he assigned it to some of the partners in exclusion of others, with a stipulation that, if he and the lessees should not agree for the renewal of the freehold lease, he would not allow those freehold mines to be worked until after the expiration of the lease of 1825. In 1837, he granted a lease of some other mines in the township to one of the partners under the agreement, and to another person, for twenty-one years. These mines were worked by the two lessees as a distinct colliery till the year 1841 under the name of the Bankwell colliery, when they ceased to be worked on account of the stipulation of the agreement of 1818 being enforced by the other partners. They were not worked again till the partnership agreement was assumed to have expired; and their profits down to 1841 were brought into the partnership accounts. In 1846, nearly all the original partners had died. There had been various sales and other devolutions of shares, and the partnership was numerous. The affairs of the partnership had been long managed by some of the partners, in exclusion of others. In 1846, when the lease of 1825 had expired, the five then managing partners determined to dissolve the partnership, and to exclude the others from any share in any new lease. This was known to one of the other partners, who

was a plaintiff, in June, 1846, and who objected, but only proposed the addition of himself. The managing partners contended that, since the termination of the lease of 1810, the partnership had subsisted only at will; and they gave notice of dissolution for 30th of September, 1846. Meanwhile, the lessor of the freehold mines had acquired a renewed lease of the copyhold mines for twenty-one years; and the five managing partners had agreed with the same lessor for a new lease of both the freehold and the copyhold mines, including the Bankwell colliery, for a further term of twenty-one years. They issued notices to the other partners of their intention to bid for the stock at the partnership sale, and the principal part of it was purchased by them. Accounts and releases were tendered to the other partners, who declined both. The new lease was soon afterwards executed, and the mines were worked by the five partners till the year 1855, when some of the excluded partners filed a bill in Chancery. The plaintiffs had always insisted on their rights, but had not taken any step for enforcing them till that time. It was held, that the new lease was taken in trust for all the partners, but that, having taken no active proceedings for so many years, the excluded partners were precluded from any equitable relief. No weight was given to the fact of the partnership having subsisted at will. Turner, L. J., said, it was more difficult for managing partners than for ordinary partners to secure the benefit of a new lease to the exclusion of co-partners, and the communicated intention to apply for a new lease would not have that effect. In considering the delay and the acquiescence, the nature of the right and of the property was to be regarded. It was a constructive, not a direct trust, and the property was subject to extraordinary contingencies, and could only be made productive by a large and uncertain outlay; and the rules as to direct trusts and ordinary property did not apply. It had been shown, that the mines had not been explored to any such extent as to render their value cer-

tain, that faults had been met with, and the expense increased. If a ruinous expenditure had rendered the mines unproductive, the plaintiffs would have made no claim. Should they in justice be allowed to reap the benefit, when they could not have been made liable to the loss? It was true, the expenditure had been more than met by the profits, but these belonged to the lessees, unless the plaintiffs were entitled to share in them; which was the question in dispute (*s*).

But when a partner is improperly kept in ignorance of events that are passing, delay will be no bar to relief.

A lead mine, called Settlingstones, was worked by two partners, who were brothers, under a lease for twenty-one years, which expired in 1845. The mine was then worked by them as yearly tenants. One of the partners died in 1847, and the other only worked the mine so as to keep it going. No claim was made by the representative of the deceased partner. In 1850, the lessor gave notice to the surviving partner to quit, on the ground of insufficient work. Before the day of notice arrived, or soon after, he negotiated an agreement with the lessor for a new lease, on new terms; and he worked the mine on his own account till the close of the year 1853, when he died. In 1851, a son and legatee of the first brother had filed a bill for the administration of his father's estate, and praying that the mine might be worked under the direction of the Court. An answer was put in, from which it appeared that frequent applications had been made for an account and refused. All further proceedings were stayed by an order of Court. In 1854, the son sold his interest to the plaintiff, who immediately filed another bill to establish his claim to a share in the mine. It was held by Romilly, M. R., that the plaintiff was bound by the acquiescence of his vendor. But this decision was reversed on appeal. It

(*s*) Clegg *v.* Edmondson, 22 Beav. 125; 8 De G. M. & G. 787; 26 L. J., Ch. 673.

was there held, that the conduct of the continuing partner precluded the notion of acquiescence, and that he was bound to disclose every fact which might enable the representative of the deceased partner to exercise a sound discretion as to the course to be pursued, and that, having been kept in ignorance, the testator's interest in the mine did not cease at his death (*t*).

The projectors of a partnership will not be allowed to extort profit by assuming to be purchasers and vendors in the same breath. Thus, three persons agreed to purchase mines for 10,000*l.*, for the purpose of establishing a joint-stock company for working them, and that the mines should be sold to the company for 25,000*l.*, of which 10,000*l.* should be paid to the vendor, and the remainder divided amongst themselves and certain friends, whom they appointed directors and officers of the company. At a meeting of the staff so appointed before the formation of the company, it was resolved, that the company should purchase the mines for 25,000*l.*, and a conveyance was made to the trustees accordingly. The whole sum was paid out of the funds of the company, and divided according to the agreement. But a suit having been brought, it was held, on demurrer, that the participators in the 15,000*l.* were liable to refund the whole sum (*u*).

There is, on the other hand, hardly any more common occurrence in mining affairs than that of partners ceasing to contribute to the working costs, and remaining quite passive to the fortunes of the concern, as long as it remains unproductive or unpromising, and, as soon as the adventure begins to be successful, then urging their claims to share in the profit as partners.

In a case decided by Lord Rosslyn (*x*), the plaintiff and defendant had been partners in a coal mine, under a lease,

(*t*) Clements *v.* Hall, 24 Beav. 333; 2 De G. & J. 173; 27 L. J., Ch. 349.

(*u*) Hichens *v.* Congreve, 4 Sim. 420; 4 Russ. 562.

(*x*) Senhouse *v.* Christian, cited 19 Ves. 157, 159.

with a right of renewal. The renewal was obtained, and the mine worked, by the defendant alone, and the bill was dismissed, on the ground that the plaintiff having waited till the concern appeared by the property embarked in it by the defendant to be profitable, keeping aloof while it was hazardous, had lost the equity he had by the renewal of his partner.

Lord Eldon, in commenting upon this case, said it involved a doctrine with regard to mining concerns, upon which at least the Court would not refuse to act without great consideration. Speculations of that nature were very hazardous. There were persons who would stand by, see the expenditure incurred—if it turned out profitable, would set up their claim—if otherwise, would have nothing to do with it—and it deserved great consideration, whether the Court would interpose, even by decree, much less on motion (*y*).

There seems to be no doubt that the possession of the legal estate would make no difference in such cases, and that the Court would interfere against even the legal owners who had not participated in the expenditure, and would declare such owners trustees, as to the whole estate vested in them, for those adventurers who have carried on the mining operations (*z*).

A similar doctrine has even been maintained at law. An estate was sold at a remote period with a reservation of coal mines; they were reserved, because no one would give anything for them. The application of machinery at length rendered them available, and the owner of the surface worked the coals after an enormous expense, and then the other party came forward. Upon the trial of the issue, which seems to have been directed by the Court of Chancery, it was strongly impressed on the jury by Mr. Justice Buller, that as the proprietor had stood by during the whole of the expenditure, a grant should be inferred (*a*).

(*y*) 19 Ves. 159.

(*z*) Forster *v.* Hale, supra.

(*a*) Adair *v.* Shaftoe, cited 19 Ves. 156.

Lord Eldon, however, though admitting the great knowledge of Mr. J. Buller, with respect to mining concerns, held the direction to be wrong (*b*). The circumstances of this case are not fully detailed. But the direction of the learned Judge was probably considered bad on the general ground of there being an insufficient adverse possession against the owner of the mines (*c*). But the case is different when a person is originally a trustee for himself and others claiming interests in the property. The legal estate vested in him may not be presumed to have passed from him. This would require a possession of the *cestuis que trust* for twenty years, without any formal recognition of the title of the trustee. If such a possession has even subsisted for that period, it will be insufficient, if the acts of ownership can be properly referred to the acquisition of an equitable estate only, or did not necessarily demand an investigation of the title (*d*). It can only be contended that the conduct of the trustee has induced a sacrifice of his beneficial interest in the particular share to which he was originally and absolutely entitled. With that interest must also fall his right to hold the legal estate; and, under proper circumstances, it is conceived, that there can be no difficulty in holding the owner of the legal estate to be a trustee for those who have exclusively persevered in the enterprise.

In a late case, it was provided in the deed of settlement of a mining company, that if the original capital was insufficient, the directors should call on the proprietors to meet and propose an increase of shares, or some other adequate means, and that if any instalments should not be paid within fourteen days, the shares should be forfeited. In 1826, the proprietors held such a meeting, and decided, that instead of making new shares, the instalments on the

(*b*) Ibid.

(*c*) Seaman *v.* Vaudrey, 16 Ves. 390. See Chap. II.

(*d*) Doe *d.* Grosvenor *v.* Swymmer, 1 Lord Ken. 385. See also Doe *d.* Milner *v.* Brightwen, 10 East, 583.

old shares should be raised. A proprietor disputed the right to call for these instalments, and refused payment, offering to sell his shares at a certain price to the directors, who declined them. This negociation ended in July, 1827. In July, 1828, the directors ordered notice to be given to the proprietor that his shares were forfeited. A correspondence followed between the secretary and the solicitor of the proprietor respecting the sale of the shares, which ended in September, without effect. No further communication occurred till November, 1837. The mines had been very unfortunate till the year 1836, when they improved, and soon became very productive. The affairs of the company had during its difficulties been very loosely managed, and a large arrear of instalment on the shares of a continuing partner had never been paid. In November, 1837, the excluded proprietor claimed his shares, and, on refusal, he filed a bill to recover them. But his bill was dismissed. The judgment was not founded on the conduct of the directors, but on the time of the institution of the suit. Knight Bruce, V. C., said, that the property was a mineral one, of a mercantile nature, subject to great fluctuation and many risks, requiring sudden outlays, producing great profits in one year, and incurring great losses in the next. Of all properties, it most required the parties to be vigilant and active upon their rights. After a struggle with years of losses, a profit at last arises. Some parties had been found to contribute funds, but for nine years the plaintiff rendered no assistance, and claimed only when the concern was prosperous. This chasm was not in any way accounted for. There was no allegation of recent discovery, or of ignorance of what was going on (*e*).

There is no custom, under the cost-book system, without express stipulation, to forfeit shares for nonpayment of

(*e*) Prendergast *v.* Turton, 1 You. & Coll. C. C. 98; 11 L. J., N. S., C. C. 22.

calls. A lease of a mine in Cumberland had been procured by three partners, of whom the plaintiff was one, and it was agreed to work it on the cost-book system, as recognized in Cornwall. The calls of the plaintiff not having been paid, the other shareholders declared his shares to be forfeited, and he was removed from the management of the mine. A correspondence ensued, and, at last, after three years had elapsed, he filed a bill for a dissolution and an account, and for a receiver in the meantime. It was attempted to be shown by the evidence that the plaintiff had abandoned his shares, but without success. Evidence was then produced on both sides with respect to the custom of forfeiture, as the system existed in Cornwall and other places. It was clearly held at the Rolls, as well as in both Courts of appeal, that there could not be such a forfeiture without a special provision to that effect in the cost-book, or deed of settlement, signed by all the original partners. It was remarked by Turner, L. J., that the evidence for the defendants, which alleged the general custom, did not distinguish between custom acting by itself, and custom aided by agreements—and that the practice of the Stannaries Court, in which the course was not to declare a forfeiture for unpaid calls, but to sell only as many shares as sufficed for the calls, and give the surplus to the defaulters, strongly confirmed that distinction.

It was, however, held at the Rolls, that, as there was no specified term of partnership, there was a right to dissolve it at any time, and that the defendants had in effect declared the partnership to be dissolved by notice. The Master of the Rolls said, if the plaintiff had insisted on sharing in the concern till it was completely wound up, it would be difficult to deny his right to an account of subsequent profits. But he was not permitted to play fast and loose. The lapse of time would have been a sufficient bar to specific performance, and the case was much stronger in mining adventures. Accordingly, the partnership was de-

cleared to be dissolved on the day of notice, and the rights of the plantiff were directed to be ascertained *at that time.* It was also held, that the possession of the legal estate did not entitle him to any particular benefit. But this decision was reversed on appeal. Both the Judges of Appeal laid stress on the legal estate of the plaintiff. Turner, C. J., also said, the decree below seemed to have proceeded on the ground that, no time being limited for the duration of the adventure, the defendants had full power to determine it, and that it was determined by the declaration of forfeiture. But the object of the declaration was to determine the adventure, not as to all, but as to the plaintiff alone, entitling the defendants to his share. Assuming, however, that the declaration of forfeiture worked a dissolution, it did not follow that the defendants were entitled to take the plaintiff's share at its then value. In ordinary cases, dissolution was followed by winding up. No partner was entitled to take the share of another at its then estimated value, and, without going so far as to hold mining adventures as altogether trading partnerships, there was not so great a difference as to entitle the defendants so to take the shares. In the absence of special provision, the partners cannot take the law into their own hands, as against defaulters. Resort must be had to a Court of Justice. Possibly the course adopted in the Stannaries Court might prevail, but each case would depend on its own facts. He distinguished the case from that of Prendergast *v.* Turton. It was declared that the adventure was determined; that an account be taken of expenditure and profits, and the sums contributed by all; that the plaintiff must allow to the defendants interest at 5*l.* per cent. upon the excess of their expenditure beyond their proper proportion; that he must not dispute any *bonâ fide* expenditure of the defendants; that he must undertake to bear his share of the expenditure; that a receiver and manager be appointed, and the question of sale reserved

till the accounts were taken (*f*). This decree was affirmed by the House of Lords (*g*).

It will be seen that, in the above case, there was an attempt to forfeit the shares summarily. That attempt having proved abortive, the partnership was put upon the terms of dissolution, and the accounts were necessarily taken to the period of actual separation. With respect to the interval for three years for presuming acquiescence, the correspondence and renewed claims of the plaintiff, as detailed in the evidence, precluded that presumption. Under such circumstances, it might be natural to give some importance to the legal estate. But when land is expressly acquired for the purpose of a trading partnership, the mere possession of that estate is deprived of much of its value; and there does not appear to be any sound distinction, in such cases of alleged or actual abandonment, between legal and equitable interests.

In cases arising under regular deeds of settlement or of partnership, with proper clauses of forfeiture, there can be no doubt that if the provisions of the deed are in that respect well observed on the part of the continuing partners, a declaration of forfeiture would be conclusive (*h*). But, in other cases, much difficulty often arises. It has been seen, that a renewed lease procured from the lessor cannot alter the rights of partners as between themselves—not even, if the preceding lease is justly forfeited by manifest breach of condition—and by entry. Each case of alleged forfeiture of shares will depend on its own facts. So far as it may depend on acquiescence, it may be maintained generally, that if the conduct of the defaulting partner has been such as fairly to lead to the presumption that he has abandoned the undertaking, and if the other

(*f*) Hart *v.* Clarke, 24 L. J., C. C. 137; 6 De G. M. & G. 232.

(*g*) Clarke *v.* Hart, 6 H. L. Cas. 633; 19 Beav. 349; 27 L. J., Ch. 615.

(*h*) See Giles *v.* Hutt, 3 Exch. 18; 18 L. J., N. S., Exch. 53. See Re The North Hallenbeagle Tin and Copper Mining Co., ex parte Knight, 36 L. J., Ch. 317.

partners have been careful to act upon such presumption, and have refrained from all acknowledgment of him as a partner, the forfeiture may be as complete as under any stringent express condition. The lapse of time will be a necessary ingredient in such a case. But in the presence of actual events, it is probable, that the time requisite for such an operation might be much limited. On the other hand, it is possible to conceive so general an apathy in the partnership, as to require a larger interval to elapse before a partner can be said to have finally abandoned the concern.

An abandonment of this kind is not strictly a forfeiture. It arises from the refusal of a Court of Equity to recognize rights which appear to have been deliberately waived.

When there is no express right to forfeit shares, the proper course for repudiating any defaulting partner is to file a bill for winding up the concern (*i*). A power for the continuing partners to bid at the sale will usually be given by the Court.

If partners can be shown to have withdrawn from a concern under circumstances which would seem to exhibit an intention to defraud the creditors of the continuing partnership, they will still be liable; and the Court will either direct an account, or an issue at law, according to the nature of the case, for determining the facts (*j*).

A mining partner cannot stipulate in a partnership deed to give his copartners the exclusive benefit of a mining lease, in the event of his bankruptcy, so as to defeat the claims of his assignees; notwithstanding that the same provision may be made in case of his voluntary withdrawal, and that his share in the other partnership assets may not be affected (*k*).

It has been held, that the purchaser of a share in a

(*i*) Clarke *v.* Hart, supra.

(*j*) Anderson *v.* Maltby, 4 Bro. 423; 2 Ves. jun. 244.

(*k*) Whitmore *v.* Mason, 2 Johns. & H. 204; 31 L. J., Ch. 433.

mining adventure does not waive objections, to the title, by taking possession of the property, and acting as a partner, when the contract stipulated that a good title should be made by a specified day, and it appeared to have been the intention of the parties that the purchaser should immediately have the possession (*l*).

The partnership documents are the joint property of all the partners. When they are delivered up for examination by an agent, by direction of the shareholders, he cannot, as a partner, insist on their being returned without the consent of the others (*m*).

In a suit for an account of dues, the Court will not order the documents to be produced, on notice, in the absence of the other partners (*n*).

Section V.

THE REMEDIES OF PARTNERS WITH RESPECT TO EACH OTHER.

I. It is a general rule of law, that a partner cannot bring an action at law against his co-partner for work and labour performed, or money expended on account of the partnership (*o*), except in respect of a separate right, or contract, or for a sum found to be due upon the settlement of an account (*p*). A Court of Equity is the proper forum for all partnership accounts.

Thus, an action was brought by a shareholder and managing director of the Cornish Tin Smelting Company,

(*l*) Stevens *v.* Guppy, 3 Russ. 171.

(*m*) Atwood *v.* Ernest, 13 C. B. 881; 23 L. J., N. S., C. P. 225.

(*n*) Lopes *v.* Deacon, 12 L. J., N. S., C. C. 311. See Marquis of Bute *v.* Stuart, ibid. 140; Taylor *v.* Rundell, 11 Sim. 391; 13 L. J., N. S., C. C. 20.

(*o*) Holmes *v.* Higgins, 1 Barn. & C. 76.

(*p*) Smith *v.* Barrow, 2 T. R. 476; Venning *v.* Leckie, 13 East, 7; Coffey *v.* Brian, 10 Moore, 341; 3 Bing. 54; Sharp *v.* Warren, 6 Price, 132; Moravia *v.* Levi, 2 T. R. 483; Wells *v.* Wells, Ventr. 40; Henley *v.* Soper, 8 Barn. & C. 16; 2 Man. & R. 153; Winter *v.* White, 3 Moore, 674; 1 Brod. & B. 350.

as the indorser of two bills of exchange, against another shareholder, who was also an agent of the company for the sale of the tin, in the receipt of a regular commission, and an additional *del credere* commission. There was a count for money had and received. The defendant sold a quantity of tin to one Richard Conness, and drew the bills upon him which were accepted, and afterwards indorsed by the defendant to W. Mears, the actuary of the company, who indorsed them to the plaintiff. It was contended, that the bills were drawn by the defendant, not as member of the company, but in his individual character, to secure the payment of a sum for which he might become responsible. This argument seemed to be approved of by Lord Tenterden at the time. But, on afterwards delivering the judgment of the Court, he observed, that if the plaintiff could recover on those bills, it would be a recovery by one joint contractor against another, and then the defendant would have a right to call upon the plaintiff for contribution. He had thought, during the argument, that the verdict taken on the count for the money had and received might be sustained. Upon further consideration, the Court thought that the defendant must be taken to have received the money, not in his individual capacity, but as a member of the trading company (*q*).

But when goods are supplied by a company to an individual member, for his private use, an action will lie for goods sold and delivered against him (*r*).

By a late act, 28 & 29 Vict. c. 99, an equitable jurisdiction is given to the County Courts, in all suits for the dissolution or winding-up of any partnership, in which the whole property does not exceed 500*l*. There is a right of appeal to the Court of Chancery.

II. If a partner can show such a case to the Court, as would authorize it to pronounce a decree of dissolution, he will, upon notice, be entitled to ask for the appointment of

(*q*) Teague *v.* Hubbard, 8 Barn. & C. 345; 1 Man. & R. 369.

(*r*) Davies *v.* Hawkins, 3 Maul. & Sel. 488.

a *receiver* or manager (*s*), and one of the partners may be appointed, if his conduct has been free from imputation of misconduct or suspicion of insolvency (*t*).

It is the duty of all partners to combine in carrying on the concern in a practicable and effective manner. In mining adventures it may frequently happen that the partners so far disagree in their proposed mode of management as to impede the proper working of the mine. It is indispensable for the success of the undertaking that some regular system should be adhered to; and if such a system cannot be amicably agreed upon, or if its proposed adoption or substitution become the source of contention and permanent difference, or if the prosecution of the adventure is grossly mismanaged, there can be no doubt that the Court will immediately proceed to appoint a manager. It will make no difference if the partnership had been agreed to endure for a term of years (*u*).

In the case of Jefferys *v.* Smith, the defendant was an owner, and the sole manager of the concern. Different acts of misconduct were imputed to him. A bill was filed for a dissolution, and a motion was made for a manager to be appointed by the Court. An order for a receiver was accordingly made, and every owner was declared to be at liberty to propose himself as a manager. It was observed by Lord Eldon, that in his country, where there were frequently twenty owners of the same mine, if each was to have a set of miners going down the shaft to work his twentieth part, it would be impossible to continue working the mine. Must not a contract be implied that it was to be carried on in a practicable and feasible way? If not, you destroy the subject altogether; it renders it impossible to carry it on (*x*).

(*s*) Goodman *v.* Whitcombe, 1 Jac. & W. 689; Crawshay *v.* Maule, 1 Swanst. 495; Smith *v.* Jeyes, 4 Beav. 503; Holmes *v.* Bell, 2 Beav. 298.

(*t*) Wilson *v.* Greenwood, 1 Swanst. 471; Crawshay *v.* Maule, supra.

(*u*) Smith *v.* Jeyes, supra.

(*x*) 1 Jac. & W. 298.

In the last case, the practice was carried so far as to order the appointment of a manager, simply with reference to the subject being a mine, and not only in respect of there being a trading partnership. But a motion for a receiver was refused, where there had only been want of co-operation, as distinct from interference (*y*).

A motion for a receiver was also refused, in a case where the plaintiff claimed under some old leases which, he contended, were still in existence, and where he had not urged his claim till considerable expenditure was incurred, and the mine became prosperous. The Court refused also to hear affidavits of title upon the motion, as in cases of waste; there was no misconduct alleged on the part of the defendant. Lord Eldon said, the defendant was a trustee for himself and all the adventurers who had not abandoned the concern, and had just as good a right to the possession as any of his fellow-adventurers. The only ground for a receiver was, that he was wasting the property, or excluding from the fair opportunity of interfering in the concern those who were entitled with him to the benefit of the licence. There was no appearance of mismanagement (*z*).

There were also mortgagees in the case, but the Court observed, that the mortgagees had nothing to do with the motion. They might enter as mortgagees; but the appointment of a receiver could not prejudice that right; and the constant habit of the Court, upon such a motion, was not to look at mortgagees further than to take care that they were not prejudiced (*a*).

It appears, however, the mortgagees afterwards took considerable shares in the mines, and then entered upon the mines and took possession, and continued to work them under the management of a person appointed by them. The remedies of a partner and a mortgagee were

(*y*) Roberts *v.* Eberhardt, 2 Eq. Rep. 780; 23 L. J., N. S., C. C. 201.

(*z*) Norway *v.* Rowe, 19 Ves. 144.

(*a*) Ibid. 153. See Berney *v.* Sewell, 1 Jac. & W. 647; Bochin *v.* Wood, ibid. 419.

thus united in the same individuals. A bill was filed by the former managing partner against the mortgagee partners, alleging that the mines were worked in a very improper manner, and praying that an account might be taken, and that upon payment of what was due to the defendants in the present suit they might be ordered to deliver up possession. One of the defendants pleaded an agreement which had been entered into between the parties, by which it was, amongst other things, stipulated that the mortgagees should remain in full possession of the mining property, and that the services of the manager appointed by the defendants should also be continued upon certain terms, but that the plaintiff should have the control of the working part of the mine. The plea was allowed by the Vice-Chancellor, but, after much argument, was overruled, upon the appeal, principally on the grounds that such a practice might keep from the knowledge of the Court circumstances which might regulate its decision, that a bill cannot be dismissed by the mere agreement of the parties, and that the averments of the plea were not sufficient: and this decision was afterwards affirmed by the House of Lords (*b*). There was also another agreement between the parties in 1819, which was not set forth in the plea.

Answers were then put in by the defendants, and a motion made, on the part of the plaintiff, for a receiver. It was stated that the accounts were improperly kept, and the mines injured by mismanagement; that they would be much improved by judicious expenditure and working, and that he was altogether excluded from the superintendence of them. These statements of mismanagement were denied by the defendants, and the motion was ultimately refused. Lord Eldon said, the great difficulty he felt arose from not seeing upon what principle he was to interfere in the present stage of the proceedings to deprive

(*b*) Rowe *v.* Wood, 1 Jac. & W. 315.

the defendants of the possession of the mine, not only as mortgagees, but as partners, and when he must assume that the agreements stated in the pleadings were binding until they had been set aside. If a man is mortgagee of a mine, and the mortgagor comes to complain of mismanagement, the first thing that requires consideration is, what is a mortgagee of a mine to do, or what omission on his part may be called mismanagement? Suppose a person is mortgagee of a mine which is likely to be much improved by a large expenditure, if he were owner, he might speculate for himself as much as he pleased. But can a mortgagee be required to do that? Can he be required to risk his own fortune in speculation, and to incur hazard in an adventure which is ultimately to redound to the benefit of the mortgagor? He apprehended that he cannot, and that at the utmost he is not bound to advance more than a prudent owner. So, taking it as the case of a partnership, with respect to mismanagement, he should like to hear to what expense a partner can be called on to go, if he happens to be a very large creditor of the partnership trade. There must be clear mismanagement, therefore, of a particular and specified nature, if the case was to be put upon that. With respect to the circumstance of the defendant being both mortgagee and partner, it was one which, if the facts were clear, deserved a good deal of consideration. As a mortgagee, he would have certain rights, and if he filled that character only, would be bound to account with the mortgagor in a particular and special manner; and it was no inconsiderable hardship on him, that he must account not only for what he has done, but for what, without his wilful default, he might have made. As a partner, he would not be obliged so to account; and a question might arise hereafter, whether the account should be directed upon the principle of partnership only, or whether a decree could be framed, partly upon the principle of partnership, and partly, if he might so express himself, upon that of mortgageeship. If

a mortgagee chooses to become a partner, the management must be considered with reference to the benefit of the other partner, as well as to the rights of a mortgagor and mortgagee; and it would be difficult to make out that the mortgagee can wholly exclude his partner from interference in the partnership. This was not, however, precisely the kind of motion which ought, at least in the first instance, to have been made, particularly with reference to the agreements (*c*).

It might have been inferred from some portions of the above judgment, that the mortgagor-partner might have been suffered to take a partial possession of the mines, and to have assumed a part in the general management, without reference to the agreements which had been entered into. But on a subsequent day, the Chancellor, on delivering final judgment, observed, that the original connection between these parties was that of mortgagor and mortgagee; and if a receiver or manager was to be appointed, in other words, if the possession was to be taken from the mortgagee, it must be on such grounds as the Court acts upon in such cases; and if it is not clearly shown, that the mortgagee is fully paid, and that almost by his own admission, the Court will not deprive him of the possession (*d*). It was said that the mortgage-money must be understood to be paid. But although it might be very questionable whether some of the items in the account would be allowed when the cause came to a hearing, he could not say that nothing was due, and the Court must get to that extent before it could appoint a receiver. If they had been merely partners, and no rights had been created by the relation of debtor and creditor, the case would have been very simple; one partner cannot exclude another from the equal management of the concern; and

(*c*) Rowe *v.* Wood, 2 Jac. & W. 553.

(*d*) Quarrell *v.* Beckford, reported 13 Ves. 377, before Lord Erskine, cited as decided by Lord Eldon, 1 Jac. & W. 649.

it is the duty of each to keep precise accounts, always ready for inspection, and, in short, to keep good faith towards each other. But whatever might have been their rights under the previous instruments, he was bound to look at the subsequent agreements, and consider them as valid, until they were got rid of by decree. If so, the rules as to partners could not regulate all their rights, because, under the last instrument, they had stipulated that whatever might be their original obligations, they would deal in the terms contained in those agreements. It had been said that the plaintiff quarrelled with those agreements, and was, therefore, not entitled to any benefit from them; but he thought the defendants were bound, without prejudice to the questions in the cause, to let him have the benefit of them, and, therefore, he had a right to have the control of the working part of the mine, until the equities were arranged. At present, he did not see his way to appoint a receiver; but he thought that the plaintiff, subject to the equities which might be ultimately declared between the parties, had a clear right to insist that regular accounts should be kept of all receipts, payments and transactions relative to the mine, and to have constant access for the purpose of inspecting the accounts; and also, that, subject to those equities, he had a clear right to control the working of the mines; and if he was impeded in the exercise of any of those rights, the application to the Court, after the other parties had been apprised of what the Court expected them to do, would be differently treated.

The conclusions to be drawn from the above important case seem, therefore, to be, that partners standing in the previous relation of mortgagor and mortgagee, with respect to mines, may enter into an agreement which may be construed to control the legal consequences of that relation, and which may entitle the mortgagor-partner to contract and direct the working management of the mine; but that, in the absence of any such agreement, or if it cannot be

supported as a binding contract, a partner will, in the capacity of mortgagee, be entitled to retain the full possession of the mine, and the entire management of the concern. In this situation he will not only be responsible, as a partner, for the proper conduct of the adventure, but he will assume the more serious situation of a mortgagee in possession.

When one partner only assigns his shares in mortgage, the mortgagee cannot, as in the last case, become entitled to the possession and control of the whole mine; for there are others who have interests in the concern, upon which the mortgagee has no claim. But he may demand and take possession of the shares mortgaged, and, unless restrained by the particular stipulation of the partnership deed or agreement, he will thus become a partner in the concern. If the assignment should produce a dissolution, he may be constituted the member of a new firm. In either case, he will be entitled to all the rights and privileges which might have been claimed and exercised by the mortgagor. In case of mismanagement or misconduct by his co-partners, he may demand the appointment of a manager from the Court (*e*).

A mortgagee of shares in a mining partnership is entitled to the usual decree of foreclosure. As between the partners themselves, the shares will only be affected by such liabilities as are sanctioned by any specific agreement, existing and in force. In taking the accounts, the mortgagee is not entitled to ask for any account of profits paid or distributed before the filing of the bill, nor to contest any call made on partners, nor to question any previous management of the concern (*f*).

In the case last cited, the partnership deed gave a right of pre-emption of shares to the other partners; and it was ordered that, in the event of absolute foreclosure, any of the other partners might redeem before a certain day.

(*e*) Bentley *v.* Bates, 4 You. & C. 182; 9 L. J., N. S., Exch. Eq. 30.

(*f*) Redmayne *v.* Forster, 35 L. J., Ch. 847.

Of course, all securities on shares are liable to the rule in equity and in bankruptcy, that all the joint estate belongs in the first instance to the joint creditors of the partnership.

III. By the general law of partnership, a partner will, in many instances, be entitled to an *injunction* against his partner; as when the latter has become insolvent, and is receiving the partnership debts (*g*), or when his conduct is overbearing and oppressive (*h*), or when he applies partnership property to uses not warranted by the agreement (*i*), or when there is an execution against the partnership property for a separate debt (*k*), or when a bill of exchange has been improperly accepted, in order to prevent its negotiation (*l*). A Court of Equity will sometimes grant an injunction under circumstances which may not call for a dissolution (*m*).

In the case of mines, an injunction will, of course, be obtainable, where the grievance is of a nature which may bring the complaining party within the ordinary rules of relief. But it would seem to be quite clear, that in no case would the Court proceed by injunction to restrain the actual operations of a mine. The consequences of such a step might be fatal to all parties, and the appointment of a manager would sufficiently remedy any cause of complaint which would arise to demand the interference by injunction. Even in cases where the title is disputed, the Court is reluctant to continue an injunction which has been obtained, for preventing the opening of a mine, and it may be safely asserted, that if a mine has been actually worked for a length of time, and is in working condition, the Court

(*g*) Williams *v.* Bingley, 2 Vern. 278.

(*h*) Charlton *v.* Poulter, 1 Ves. 429; 19 Ves. 148.

(*i*) Glassington *v.* Thwaites, 1 Sim. & Stu. 124.

(*k*) Taylor *v.* Field, 4 Ves. 396; Bevan *v.* Lewis, 1 Sim. 376.

(*l*) Hood *v.* Aston, 1 Russ. 412.

(*m*) Charlton *v.* Poulter, 19 Ves. 148, n.; Goodman *v.* Whitcomb, 1 Jac. & W. 592.

would not interfere by so summary a proceeding (*n*). In the case of Field *v.* Beaumont, it was observed by Lord Eldon, that to stop the working of a coal mine was a serious injury (*o*). The same observation is true with respect to almost all mines.

IV. The remedy of *account* between partners is usually decreed by the Court upon a dissolution. It is hardly yet settled whether, in general partnerships, a partner can obtain a decree for an account without praying for a dissolution. Lord Eldon seems to have been of opinion that he cannot (*p*), and there have been contrary decisions on the subject (*q*). It is said, few occasions can arise in which it is desirable to apply for an account only, and not for a dissolution. In mining transactions, however, it may often be important to insist upon an account, without proceeding to a dissolution.

In a case in the Exchequer, a bill was filed by the mortgagee of certain shares in a colliery for an account, and for the appointment of a manager, without praying for a dissolution. It was urged in support of the bill, that the parties were to be considered as tenants in common of land, and that the case was governed by that of Jefferys *v.* Smith (*r*), where the Court interfered by appointing a manager without a dissolution being asked for. There can be no doubt that there was a trading partnership (*s*), for the mines were held under a lease for thirty-one years, for the express purpose of mining, and the deed of settlement evidently described the parties as comtemplating a commercial trade or business. It was objected, that on this ground, an account could not be directed, without praying also for a dissolution. But it was held by Lord

(*n*) Grey *v.* The Duke of Northumberland, 13 Ves. 236; 17 Ves. 281. See Chap. II.

(*o*) 1 Swanst. 206.

(*p*) Forman *v.* Homfray, 2 Ves. & B. 329; Marshall *v.* Colman, 2 Jac. & W. 266.

(*q*) Knowles *v.* Haughton, 11 Ves. 168; Harrison *v.* Armitage, 4 Madd. 143; Loscombe *v.* Russell, 4 Sim. 8.

(*r*) Supra.

(*s*) See sect. 1.

Abinger, C. B., that the rule only applied to strictly mercantile partnerships, and that the lessees were in the position of mercantile partners, not for all purposes, but only for the purposes of public convenience and justice. It would be hard to say, that partners should be obliged to put an end to all interests before they should be able to bring one another to account, and especially in the case of lessees of a colliery, disputing about their estate, that the party seeking a remedy should be compelled to sell his share (*t*).

It would appear, also, that if the parties had not been commercial traders, but only tenants in common, enjoying the profits of land, an account might have been obtained without praying for a dissolution, on the ground, that the managing owner is acting on behalf of himself and his co-tenant (*u*). This is only pursuing the principle established in the case of Jefferys *v.* Smith (*x*).

In a case, where it was alleged in the bill that the defendant was violating the partnership articles for the purpose of compelling a dissolution, it was held by Wigram, V. C., that the bill was not liable to a general demurrer for not praying a dissolution, and that the plaintiff might be entitled to accounts and other relief (*y*).

But in another case, two solicitors, partners, had also carried on a coal mine, which they held in fee simple as tenants in common, as a joint concern. Disputes arose between them, and one of them continued to work the mine. The other refused to concur in working, and to contribute to the expenses. The managing partner filed a bill for an account and a receiver, but not for a dissolu-

(*t*) Bentley *v.* Bates, 5 You. & C. 182; 9 L. J., N. S., Exch. Eq. 30.

(*u*) Ibid.

(*x*) Supra.

(*y*) Fairthorne *v.* Weston, 3 Hare, 387; 13 L. J., N. S., C. C. 263. See also Deeks *v.* Stanhope, 14 Sim. 57; 13 L. J., N. S., C. C. 453; Wallworth *v.* Holt, 4 My. & C. 619; Taylor *v.* Davis, 4 L. J., N. S., C. C. 18; Richards *v.* Davies, 2 Russ. & M. 347; Miles *v.* Thomas, 9 Sim. 606; Richardson *v.* Hastings, 11 Beav. 17; 16 L. J., N. S., C. C. 322.

tion. Wood, V. C., said, that with the exception of Wynget *v.* Heathcote (*z*), cited from recollection of counsel, there did not appear to be any case in which the Court had appointed a receiver of mines, worked in partnership, without having before the Court a suit for dissolution. It was not now necessary to ask for dissolution in every case in which partnership relief is sought; but where a bill sought for an account, a dissolution must be prayed. Unless some special ground is raised, the general accounts cannot be taken without that prayer. In Bentley *v.* Bates (*a*), it was held, that the accounts of a mining concern might be taken without that prayer. But the difficulty would be enormous if the Court were called in, in all such disputes, to appoint its own manager. It might have to manage all the mines in the kingdom. When a mining concern was held as land, as by two coheirs, there was a partnership in the working only, and not in the land—and either of the owners might terminate the joint working. If one continued to work, he would be liable to render an account to the other, as in Denys *v.* Shuckburgh (*b*). If, on the other hand, there was a real partnership, any of the partners might determine it, and insist on a sale. In either case it would be proper to ask for a dissolution and winding-up of the concern, and for a receiver in case of disagreement. In the present bill, it was not clear in what way the plaintiff regarded the concern. The Court could not foresee whether it would, at the hearing dissolve the working partnership, or sell the whole fee simple (*c*).

It was objected, in the above case of Bentley *v.* Bates, that the mortgagee of a trade could not be entitled to an account, as he only possessed a limited interest in the property, and his remedy was confined against the assignor (*d*).

(*z*) Cited 4 You. & C. 187.

(*a*) 4 You. & C. 182, supra.

(*b*) 4 You. & C. 42, supra; Chap. IV.

(*c*) Roberts *v.* Eberhardt, 2 Eq. Rep. 780; 23 L. J., N. S., C. C. 201.

(*d*) Ex parte Burrow, 2 Rose, 255.

But it was held, that the mortgagee, even of a trade, might, under some circumstances, as in cases of the recognition or false accounts of the acting partners, be entitled to the remedy of account. With respect to its being a partnership in land, it was admitted that if the assignment had been absolute, the assignee might have filed his bill for an account against the co-lessee. It was justly observed, that the equity of redemption was an interest available only to the mortgagor, and those claiming under him, and that with respect to third persons, the title of a mortgagee as completely entitled him to equitable remedies, as if there were no equity of redemption at all. The mortgagee, therefore, of such an interest had exactly the same remedy against the co-tenants as the mortgagor.

The accounts of a partnership will be taken by the master according to the directions of any agreement entered into by the parties; and in the absence of stipulation, the general rule is, that each partner is to be allowed against the other everything he has advanced or brought in as a partnership transaction, and to charge the other with what that other has not brought in, or has taken out more than he ought; and nothing is to be considered his share but his proportion of the balance (*e*).

The right of a partner to insist upon a *dissolution*, and the consequences of that step, have already been discussed (*f*).

In the case of a partnership already subsisting, the partners entered into a written agreement, which recited an apprehension that it would be competent for one partner to determine the partnership and bring the whole property to sale, and that the death of one partner would produce that effect, and which also recited a desire that their interests should be so far several, that the share of any partner should be transmissible to his representatives, and that the partnership interest should not be determined,

(*e*) West *v.* Skip, 1 Ves. 242. (*f*) Sect. 2.

and the entire property sold, without the consent of the majority in value, but each should be competent to sell his own share only; it was then agreed that each of them should hold to himself, transmissible to his own representatives or assigns, an aliquot share of certain of the partnership property, and that their joint holding should not be subject to the ordinary terms applying to partnership property, so as to entitle any one of them to a sale without the concurrence of such majority, or to dissolve the partnership, or so as to cause a total dissolution by the death of one. It was held, that this agreement did not intend that the representatives of a deceased partner should continue partners with the survivors, and contribute to the working of the colliery on their joint account, but only that no partner or his representatives should be entitled to a sale of more than his own share (*g*).

The agent of a mine had raised money to pay workmen by indorsing two promissory notes made in his favour by seven out of nine shareholders. The other two had refused to sign. At a subsequent meeting of the partners and creditors, it was decided to sell the mine, and the agent claimed as a creditor for the above money. A deed of assignment was then prepared, and executed by the agent, and the money was set opposite to his name in the usual way. In an action brought by the agent on one of the notes against the seven shareholders, they pleaded the deed as a release, and that he signed it as a creditor in respect of debts incurred on behalf of the whole firm. But it was held, that the claim was not released, that the deed was executed by him in respect of the loan as a creditor of the whole firm, but not as a creditor of those only who signed it (*h*).

An attested copy of a lease of a coal mine was deposited by one of the partners by way of equitable mortgage. The partnership articles gave to each partner a

(*g*) Tatam *v.* Williams, 3 Hare, 347.

(*h*) Lanyon *v.* Davey, 11 M. & W. 218; 12 L. J., N. S., Exch. 200.

power of pre-emption, if any one wished to sell his share. It was held by the Court of Review, that it could not make the actual order for sale under the equitable mortgage, as the partnership accounts should first be taken, which the Court had no power to direct (*i*).

A bill in equity by partners against co-partners need not make all the shareholders parties, unless the Court is required to act against the interests of any of the parties not on the record, as in a bill for an account (*k*).

A bill was filed against the directors of a large joint stock company for an account, and for making them liable for losses occasioned by their mismanagement. There was no prayer for dissolution. It was held, relief might be given without making all the shareholders parties to the suit (*l*).

In a suit in Chancery every defendant possesses the right to put in a separate answer, although there be but a common defence (*m*). In mining and other public companies, this was the occasion of much complaint to the plaintiffs. In one case of a suit relating to mines in Cornwall, the defendants were so numerous that the plaintiffs were not able to bear the expense of taking the answers off the files of the Court, and the suit dropped. In consequence of these complaints, a general order (*n*) was made, by which it is ordered, that when the same solicitor is employed for two or more defendants, and separate answers shall have been filed, or other proceedings had, by or for two or more defendants separately, the Master shall consider, in all cases of taxation, whether the separate answers or other proceedings were necessary or proper; and if he thinks any part of the costs to be improperly incurred, it shall be disallowed.

(*i*) Ex parte Broadbent, 1 M. & Ay. 635; 4 Deac. & C. 3.

(*k*) Attwood *v.* Small, 1 You. 407; Ibid. L. C. Feb. 1, 1840; Long *v.* Yonge, 2 Sim. 369; Sibley *v.* Minton, 27 L. J., Ch. 53.

(*l*) Deeks *v.* Stanhope, 14 Sim. 57; 13 L. J., N. S., C. C. 453. See Hichens *v.* Congreve, 4 Russ. 562.

(*m*) Van Sandau *v.* Moore, 1 Russ. 441.

(*n*) April 28, No. 27.

When the property of the partnership is taken in execution for the private debt of a partner, it is said the sheriff must seize all the goods, and sell the undivided share, because the shares are undivided (*o*).

In an action against the sheriff for a return of *nulla bona*, it was pleaded that the debtor had one-third of a colliery, with property belonging to it to a much larger amount than the debt. It was contended, the sheriff should have levied on the joint property to the extent of one-third. Lord Tenterden said, he was not quite satisfied as to the interest which the sheriff might have sold, and that there was great difficulty in making the sheriff a tenant in common with the partners (*p*). But it is held, that as soon as goods are taken the partnership ceases, and the creditor (not the sheriff) is tenant in common with the others. The sheriff may maintain trover or trespass. When the goods are sold the purchaser is tenant in common (*q*).

But relief is given in equity, by restraining the sheriff from selling and taking accounts. If the execution is levied the money may be arrested in his hands.

Every share is taken subject as the debtor had it, and to the rights of other partners (*r*).

It is presumed, when mines are held in shares which give no direct interest in the partnership property (*s*), execution can only be levied by selling the shares without any express reference to the property.

From the preceding pages it must have sufficiently appeared that it is of great consequence for persons entering

(*o*) Heydon *v.* Heydon, 1 Salk. 392.

(*p*) Barton *v.* Green, 3 Car. & P. 306.

(*q*) Hawkshaw *v.* Parkins, 2 Swanst. 549; Parker *v.* Pister, 3 Bos. & P. 288.

(*r*) Skip *v.* Harwood, Cowp. 451.

(*s*) See Chap. VI.

upon enterprises for the working of mines, in connection with others, to have their situation and their relative liabilities ascertained by express stipulation. It is unnecessary to add that these stipulations should always be reduced into writing, and properly signed by the parties intended to be bound.

Some allusion has been already made to the propriety of exercising caution in these respects. It has been mentioned, in particular, that persons who may stand both in the relation of landowners working the produce of their estate, and of commercial traders, should settle this preliminary question affecting their relation to each other, and to the public, by written agreement or declaration.

But the necessity for procuring partnership articles appears much stronger in contemplating the consequences resulting from the actual and acknowledged existence of a commercial union. In has been seen, that in the absence of express stipulation, or custom regulating its duration, a partnership may be dissolved at any time, by simple notice, by alienation of shares, and by other causes, some of which are within, and some of which, as in the case of death, are beyond the control of the parties. The very nature of mining adventures requires almost invariably, not only the expenditure of capital and labour, but a steady and sustained system of gradual operations, and of patient perseverance. These objects cannot be secured by partnerships subsisting merely at the will and caprice of any of the partners. It is true, a Court of Equity will interfere in certain cases, to prevent the waste of mining property, and the decay of the works, by the appointment of a manager to superintend and direct the proper working of the mine. Great difficulty might, however, be sometimes experienced even in effecting this purpose, if the prospects of the mine were not in a very flourishing condition. At all events, such a step would, in case of dissolution, only be preparatory to a sale of the whole property, in case any of the partners chose to insist upon those rights, which may have

been either originally acquired, or which may have recently devolved upon them by conveyance, death or misfortune. The agitation of such questions might, in some instances, paralyze the whole mining operations; and it might be of great importance that the works should be prosecuted under a more efficient and extensive system of management than could be prudently, or perhaps possibly, adopted during the interregnum of a receiver. It is also true, the existing partners might agree to repurchase the property according to their respective shares without incurring much actual loss; for, whatever might be the amount of valuation or sale, they would then stand in the situation both of vendors and purchasers, except with respect to the particular shares disposed of by a retiring owner. But the expenses, delay, exposure, and general inconvenience, consequent upon such proceedings, ought to furnish powerful motives to deter partners from neglecting those previous arrangements by which the general rules of law may be controlled, and by which such unpleasant results may be effectually prevented. It is incumbent, said Lord Eldon, in a mining case, on those who engage in partnerships to protect themselves by contract against its inconveniences: if they omit that precaution, courts of justice have no right to redeem them from the penalties of their imprudence (*t*).

Partnership agreements are also important in considering the liabilities consequent upon such unions. It has been seen, that a mining partner cannot, by the general law, bind the firm by exercising all the acts of an ordinary partner; but that the rules of law are, in such cases, dependent upon the non-existence of usage to the contrary, and that there may, in many instances, be very little actual difference, and possibly, in some instances, no difference at all, between the power of a partner for the working of mines, and that of a partner for the general purposes of

(*t*) 1 Swanst. 522.

commerce. It is obvious, therefore, that it may become of the greatest consequence that the mutual rights and privileges of the partners should have been distinctly ascertained by agreement, and especially in cases where the selection or introduction of partners is either wholly uncontrolled, or depends upon the disposition of a large body of adventurers. By such precautions the mutual rights of the partners themselves will be effectually regulated; and the claims of the public may also, in many cases, be properly controlled.

It is usual in such instruments to make many other special stipulations, which may be demanded by the circumstances of the case, and the situation and intention of the parties. Thus, the amount of capital, the payment of calls, the distribution and forfeiture of shares, the retirement or expulsion of a partner, the introduction of new partners at the will of the parties, or by operation of law, the mode of transfer of shares, the system of management, the mode of transacting business, the specific objects of the adventure, the manner in which accounts are to be kept and rendered, the division of profits, the manner in which the affairs of the firm are, upon a dissolution, to be brought to a settlement, and various other particulars, may require the insertion of express stipulations which may have reference to the exigencies of the occasion.

It may sometimes be advisable to prohibit altogether the alienation of shares, and the introduction of any other partners than those claiming by devise or operation of law, or to stipulate that those events should depend upon the opinion of the other persons interested in the concern. In most cases, however, it is preferable to limit the rights of the parties rather than to oppose the free alienation of the property.

It has been seen, that a permanent and violent difference of opinion, with respect to the management of a concern, may be a cause for dissolution, when the partnership is agreed to be carried on for a term of years. This

result may, however, be prevented by an agreement that the management shall be intrusted to certain persons, or shall depend upon a majority of votes. In like manner, it may be agreed that the adventure may be brought to a conclusion before the expiration of a partnership term, either for specified reasons or not. Generally, the vote of one partner, in respect of a very insignificant interest, will be equal to that of one who may be entitled to nearly the whole of the property. This effect may, of course, be obviated by the ordinary stipulation, which makes the voting depend upon the number of shares held by each individual.

The extent, character and variety of all special stipulations will depend upon the intentions of the parties; and these will be guided by the nature, objects, magnitude, and general features of the undertaking. It may suffice to conclude by observing, that, under all circumstances, the advantages of a mining adventure, of any present or prospective consequence, will be materially enhanced by the adoption of a sound and judicious code of practical rules for its management. An enterprise well regulated by previous agreement may thus, whether successful or unfortunate in its results, be both conducted and concluded in a manner agreeing with the feelings and dispositions of all honourable adventurers. Such regulations may effect much more; for they may often prevent the necessity for an appeal to that dreaded Court, which has so often exhausted the profits of partnership, and the patience of partners; and which has so frequently administered its delayed remedy long after it has ceased to be an object of desire.

CHAPTER XI.

INJURIES CONNECTED WITH MINING OPERATIONS.

I. *General Rules.*
II. *Injuries to the Surface by Undermining.*
III. *Inundations—Barriers.*
IV. *Other Injuries—Private and Public Nuisances.*
V. *The Statutes of Limitation.*
VI. *Liability of Owners and Agents, Masters and Servants, Contractors and Workmen.*
VII. *Canal and Railway Companies.*

Section I.

GENERAL RULES.

Minerals are seldom obtained without injury to the surface. Mining operations invariably interfere with the ordinary enjoyment of land, except under very peculiar circumstances.

When mines or quarries belong to the owner of the surface, and he is in actual possession of both, there can, of course, arise no question respecting the right to commit acts of injury, or the extent of the injury inflicted. For such a person will have the complete ownership and dominion over the whole land.

But when the right to work mines is distinct, either for a limited period or permanently, from the possession of the surface, it must be exercised with due regard to the rights of those interested in the surface. The general rule of

law, in all such cases, is *sic utere tuo ut non alienum lædas;* and though the mining adventurer may not be restrainable from enjoying his property to the injury of that of others, he will be compelled to give adequate compensation to all other owners whose rights may be unjustly infringed.

It is, of course, competent for absolute owners to agree, either that the mines may not be worked at all during their severance from the general inheritance (*a*), or that they may be worked with extraordinary powers over the surface. It has been seen, that the lord of a manor, in the absence of special custom, is unable to work mines in the lands of his copyhold tenant, because the tenant has a right of possession, though not a right of property, in the whole of the land (*b*). An ordinary lessee for years, in the absence of exception or reservation, is precisely in the same situation; and it has been before remarked, that it is incumbent on every lessor of lands in which there are mines, the possession of which he wishes to retain, not only to except the mines themselves, but to reserve all those privileges for working them which may not be implied by law, but which may be highly instrumental in enabling him to take the most complete advantage of his exception. If these objects are not previously accomplished, the lessee will be a necessary party in order to authorize any disturbance of his possession by working the mines, or giving additional privileges to the adventurer.

It would, of course, be in the power of competent owners to agree that the grantees should not be responsible for *any* damages occasioned by the working of the mines. It seldom happens, however, that such stipulations are inserted in grants or exceptions of mines. This exemption may sometimes occur in mountainous and remote districts, where the value of the surface may be justly disregarded. But all mining grants are usually

(*a*) Earl of Cardigan *v.* Armitage, 4 Barn. & C. 197.

(*b*) See Chap. II.

made upon condition that reasonable sums shall be paid in respect of the amount of injury which may be sustained, from time to time, by the proprietors of the surface. In all such cases, therefore, an action for reasonable damages may be maintained (*c*).

If mines are worked, under such reservations, by lessees, it will be incumbent upon them, in the absence of special agreement, to satisfy the just demands of all owners of lands which may be injured by the mining operations.

Section II.

INJURIES TO THE SURFACE BY UNDERMINING.

I. *In the same Lands—vertical support.*
II. *In adjoining Lands—lateral support.*

I. The right of support which is claimed by an owner of the surface is distinct from any right to compensation claimed under the ordinary terms of a grant or exception of mines,—and any such specific stipulation will not defeat the right of support, unless it is expressly included (*d*).

The right of support may first be considered in those cases where the mines are held as a separate inheritance or tenement, distinct from the surface. It is now established by recent decisions, that, as a general rule of law, the owner of the surface is entitled to absolute support—and, as in cases of rights to water, not as an easement or right depending on a supposed grant, but as a proprietary right at common law. There must have been a time, in all cases, when the surface land and all the minerals below were held together by one owner, in one right. When this entire right is severed, either by the

(*c*) Littledale *v.* Earl of Lonsdale, 2 H. Bl. 267, 299. See 7 East, 371, 372.

(*d*) Harris *v.* Ryding, Humphries *v.* Brogden, and Smart *v.* Morton, infra.

grant of the mines only, or of the lands with an exception of the mines, it is presumed by law, that neither of the separate owners has a right to destroy or damage the property of the other. For a grantor cannot derogate from his own grant, and he has also a right to the proper enjoyment of his own reservation. The right of the surface owner has been likened to that of an owner of an upper story of a house, who holds his tenement with an implied right of support from the owner of a lower story. This rule will, of course, not refuse to sanction injuries which are strictly necessary or proper for enjoyment, and capable of compensation, whether the powers be express or not. On the other hand, it will also enlarge itself according to the ampler authorities which may be expressly given.

This presumption of law, like many others, may be repelled by evidence of a contrary kind. *Modus et conventio vincunt legem.* But the burthen of proof lies on those who claim to control the rule of law. If any mine owner can show, by documentary evidence of the original terms of severance, or by express subsequent agreement, or by statute, or by notorious usage so long and so uniform as to lead to the presumption of a grant, or by any other sufficient legal evidence, that he is entitled to work his mines without leaving support to the surface, this claim, however unreasonable it may appear, will be allowed to prevail. For no proprietor can insist on rights which have been abandoned by himself or by those under whom he holds his title, or which have been taken from him by a superior power (*a*).

When there is an absolute right of support, it is not material that the surface owner is ignorant or cognizant of the state of the mines, or the mode of working, or that the mine owner has shown the utmost skill and prudence in working them.

In an action brought against mine owners for injuries

(*a*) Williams *v.* Bagnall, MS., Dec. 10, 1866 (Wood, V. C.)

to two dwelling-houses, it appeared that a former owner of the whole estate had disposed of the surface lands, with a usual reservation of all the mines and minerals, and with a clause of compensation for injuries done in working them. The houses had been built since the severance. It was held, that only the reservation entitled the mine owners to so much as they could get, leaving a reasonable support to the surface. Parke, B., said, the meaning of the grantor was not to reserve every particle of the mines below, but only so much as was consistent with the enjoyment of the surface according to the true intent of the deed. The defendants ought to have pleaded, that they took the coal, leaving a reasonable support for the surface, in the state it was at the time of the grant. The compensation clause seemed to apply only to the exercise of rights on the surface; but if it were otherwise, it only gave an action of covenant, in addition to any other remedy for acting against the power. It was a cumulative remedy—and did not take away the remedy at law, if the party was not justified in doing the act by the power. The question was, whether the defendants were justified by the power given before. If they were, they had a good defence—if not, whether or not the plaintiff might have brought an action of covenant, there was no doubt they were liable to an action upon the case for such damages as he had sustained by their unauthorized act. Alderson, B., said, the two proprietors, one of the land above, the other of the mines below, must each act on the maxim, that he is to use his own property so as not to injure his neighbour. The defendants must get the minerals in a reasonable and ordinary mode, and leave a proper support for the other man's land. Parke, B., added, that all the coal might belong to the defendants, but that they could not get the coal without leaving sufficient support (*b*).

In a case, where a jury had found that the plaintiff had

(*b*) Harris *v.* Ryding, 5 M. & W. 60; 8 L. J., N. S., Exch. 181.

been in possession of the right of support for his house for twenty years, it was held, that a declaration, which did not show how the right was acquired, was sufficient to support the verdict—on the ground that the right to vertical support is a presumptive right at common law arising from the possession of the surface, and that this right had not been contradicted by any evidence of a contrary kind (*c*).

The same rule of law is extended to land acquired by a railway company—and the right of support exists independently of the ordinary provisions of the railway acts of parliament (*d*).

In like manner, in every demise of minerals where the surface is retained by the lessor, it is a presumption of law, in the absence of expressions of a contrary tendency, that he reserves to himself the right to support (*e*). The same presumption arises in demises of the surface, with an exception of the mines, in favour of the lessee. The usual clause, that the mine owner shall do as little damage as possible to the soil, does not operate in restraint of that right of support (*f*). In like manner, a lessor cannot injure his lessee by working an upper bed of mineral, which is not demised—even if it be properly worked—unless there be a different stipulation in the lease (*g*).

The same rule of law has been applied to lands of copyhold tenure.

In an old case, it was held, that a claim for the lord to heap up coal and refuse extracted from other adjoining freehold lands, and to make cinders in the copyhold lands *near* to the pits, could not be supported, as being both uncertain and unreasonable. The case was removed by

(*c*) Rogers *v.* Taylor, 2 Hurl. & N. 828; 27 L. J., Exch. 173.

(*d*) Caledonian Railway Company *v.* Sprot, 2 Macq. 449.

(*e*) Dugdale *v.* Robertson, 8 Kay & J. 695.

(*f*) Proud *v.* Bates, 34 L. J., Ch. 406.

(*g*) Shaw *v.* Stenton, 27 L. J., Exch. 253; 2 Hurl. & N. 858.

writ of error, on which occasion Lee, C. J., said, the claim savoured of an arbitrary power, and put it in the power of the lord totally to deprive the tenant of the whole benefit of the land (*h*).

It has been seen that a custom or prescription which claims a manorial right to work mines under any messuages or buildings without making any compensation for injury, but only for user of the surface, has been held to be unreasonable and invalid (*i*). The above case of Broadbent *v.* Wilkes was mainly relied on, and similar cases occurring in common lands were also cited in the judgment. In Broadbent *v.* Wilkes the claim was not incident to the working of the mines in the lands themselves, and indeed not necessarily incident to any mines at all; for it might equally have been made with respect to any surface substances. There seems to be no good ground for saying that a custom may not give the right to work the mines without support, and even without compensation, in the same way as it may give the right to work at all. It may be difficult to prove such a custom, but, when proved, it exists as part of an original ownership, and in connection with an acknowledged right of property. The tendency of mining works is always towards destruction of the surface, and it is impossible to define the limit which may protect the copyholder against the *bonâ fide* exercise of such rights. Again, as the right to withhold support without any compensation may be the subject of grant (*k*), it may also be established by prescription.

In a late case of importance, an action was brought by a copyhold landowner against the lessees of coal mines underneath, held under the Bishop of Durham. By neither party was the title shown any further than the actual possession. The defendants were charged with

(*h*) Broadbent *v.* Wilkes, 1 Wils. 63; Willes, 360; 2 Strange, 1224.

(*i*) Hilton *v.* Lord Granville, 5 Q. B. 701; 13 L. J., Q. B. 193 See Chap. II.

(*k*) Rowbotham *v.* Wilson, 8 H. L. Cas. 348; 30 L. J., Q. B. 53.

having, "contrary to the custom and course of practice of mining used and approved of in the country" where the mines were, worked them so negligently and carelessly as to cause the land of the plaintiff to subside, crack and swag. The coal owners had worked all the coal without leaving any pillars or support to the roof. The jury found a special verdict, that the lessees had worked "carefully and according to the custom of the country, but without leaving sufficient pillars or supports." The case was argued before the Court of Queen's Bench. Lord Campbell, in giving its judgment, after stating that the case was relieved from any question of buildings, said, the owner of the surface was entitled to have it supported by the subjacent mineral strata. If the strata are removed, and the surface subsides and is injured, the operation may not be negligent nor contrary to custom, yet the owner of the surface may maintain an action for the damage. Unless the surface is entitled to this support, corresponding to the lateral support from the adjoining close, it cannot be securely enjoyed as property, and where the mineral strata approach the surface and are of great thickness it might be entirely destroyed. The rule giving the right of support, in the absence of express grant, reservation or covenant, must be general, without reference to the nature of the strata, or the difficulty of propping the surface, or the comparative value of the surface and the minerals. The attempt to introduce qualifications would lead to uncertainty and litigation. Greater inconvenience could not arise from this rule in any case, than when the surface belongs to one, and the minerals to another who cannot take any part without the consent of the owner of the surface. In such cases a hope of reciprocal advantage would bring about a compromise advantageous to the parties and to the public. "Reasonable" support cannot be measured out by degrees, and the only support of that kind is that which will protect the surface from subsidence. It had been argued, that the analogy as

to adjoining superficial closes did not apply where the surface and the minerals were separate tenements belonging to different owners; because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend on the deeds by which they were severed. But in contemplation of law all property in land having been in the crown, it may be conceived that at the same time the original grant of the surface was made to one, and of the minerals under it to another, without an express grant or reservation of any easement. Suppose unity of title from the surface to the centre, if the surface and the minerals were vested in different owners without any deed appearing to regulate their respective rights, there was no difficulty in presuming that the severance took place, so that the owner of the surface will have a right to support. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving support—and if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface before enjoyed. It might be said, that if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his right, and is seeking to hinder the grantee from doing what he likes with his own—but, generally, mines may be profitably worked, leaving support by pillars or ribs, though not so profitably as if the whole of the minerals be removed, and a man must so use his own as not to injure his neighbour. After stating the analogy to the different stories of a house, in which the owner of the upper story has a right of support without express grant (*l*), and reviewing the authorities, the Chief Justice said, they had attempted, without success, to obtain, from the codes and jurists of

(*l*) See Erskine's Inst. book ii. tit. 9, s. 11 (15).

other nations, information and assistance respecting rights arising from horizontal divisions of property. There was most minute regulation in the civil code, and in the French code, respecting support from lateral pressure (*m*).

In another case of reservation by an owner of the whole inheritance, in an indenture of 1671, the coal mines were excepted, with full powers to work them, with way-leave, and with a covenant by the grantor for payment of treble the damages, loss or prejudice which the grantee should sustain in the working and leading. An action was brought for working the mines without leaving sufficient support, and thus causing the land to subside and the houses to crack. It was pleaded, that the mines had been worked properly and according to the course and practice of mining used and approved of in the county (Durham), and that the defendants were ready to pay damages according to the covenant. It was admitted at the trial, that the defendant had removed all the coal without leaving any support, and had produced the injuries complained of. It was also shown that in 1671, and till 1810, the practice of mining in the county was to leave ribs of coal sufficient to support the surface land—but since 1810, it had been the practice to work out all the coal, paying compensation for the injury occasioned to the surface. In other respects, it was admitted that the mines were properly worked. Lord Campbell, in giving the judgment of the Court on demurrer, and on the points reserved at the trial, said the plaintiffs were entitled to judgment on the demurrer. The owner of the surface is *primâ facie* entitled to support from the subjacent strata—and if the owner of the minerals worked them, it was his duty to leave sufficient support for the surface in its natural state. The *primâ facie* rights and obligations of the owners of the surface and of the minerals might

(*m*) Humphries *v.* Brogden, 12 Q. B. 739; 20 L. J., N. S., Q. B. 10. See Allaway *v.* Wagstaff, 4 Hurl. & N. 307, 681; 29 L. J., Exch. 51.

be varied by the production of title deeds, or by other evidence. But, in the present case, the simple reservation of the minerals would not deprive the grantee of the surface of the right to support from the minerals—and the defendant must rely upon the special powers reserved for working the minerals. After stating that a deed might be framed, empowering the owner of the minerals to remove the whole, without leaving any support, and subject to compensation, he said, Harris *v.* Ryding was an express authority to show that the deed of 1671 was not so framed. On comparing it with the deed in that case, no substantial difference was found. It might be contended, that the powers reserved in the present case were not confined to such as were to be exercised on the surface; but, wherever exercised, they were perfectly consistent with their exercise being subject to the implied right of the owner of the surface to support the minerals. The right of compensation might well be contemplated as extending only to injuries which might arise from mining, the mining being carried on so that the surface had still a sufficient support. With respect to the verdict, which was properly entered for the plaintiffs, the acts complained of were not necessary for the working of the mines, though necessary for the complete removal of all the minerals, and were "not done carefully, skilfully and properly, and according to the course and practice of mining." The Court could not say, that the evidence for the defendants was sufficient to prove a course of practice in such cases for the entire removal of the coal. They thought, in accordance with Harris *v.* Ryding, that the course and practice alleged must be taken to be the course used and approved of in the county at the time of the reservation. But according to that course, till 1810, ribs of coal were left to support the surface (*n*).

The same common law right of support has been applied

(*n*) Smart *v.* Morton, 24 L. J., Q. B. 260; 5 E. & B. 30.

to inclosure lands, when it is consistent with the provisions of the Act of Inclosure (*n*).

An Inclosure Act reserved full power for the lord to enter and get coal and ironstone on making satisfaction to the owners of the allotments injured. It was provided, that the lord should, on no accouut, carry on any work on the surface within forty yards of any dwelling-house, nor get any coal or ironstone under any dwelling-house within the perpendicular distance of forty yards from the foundation. Mining works were carried on in a proper manner, and not within the prohibited distance. But subsidence took place, and the houses on the surface were injured. It was held, that the lord was liable to an action for the injury, and that no exemption was implied by the absolute prohibition within a certain distance (*o*).

But the surface rights may be materially modified by special stipulation.

An award had allotted a certain part of the surface to one owner, and the minerals underneath the same part to another. The award, which was executed by the owner of the surface, contained a covenant that the mines might be worked without any liability to any action for damages on account of the surface being rendered uneven by sinking in hollows, or being otherwise defaced and injured; the proprietors having agreed to accept their allotments accordingly. Houses were built on this land, and, after a lapse of more than twenty years after their erection, they were injured by the working of the mines below. The mines had been worked with ordinary care, according to the custom of the neighbourhood which had prevailed at the time the Inclosure Act was passed, viz., by working out the whole coal and leaving artificial pillars. It was held, that the owner of the surface had acquired his title with only a qualified right of support, and could not maintain

(*n*) Wakefield *v.* Duke of Buccleugh, MS., May 8, 1867 (Malins, V. C.)

(*o*) Roberts *v.* Haines, 6 E. & B. 643; 25 L. J., Q. B. 353; (Error) 27 Ib., Exch. 49. See also Proud *v.* Bates, 34 L. J., Ch. 406.

an action for damage caused by usual and proper working of the mines, and that no new easement had been acquired in respect of the houses built more than twenty years before the date of the injury (*p*).

It was also held, in the appeal to the House of Lords in the above case, that the Act of Inclosure did not exact the allotment of land and mines together, and that they might be separated for mutual convenience; and, that if the award was bad, the deed would operate as a grant against the owner of the surface.

In another Inclosure Act, all the previous rights of the lord as to the mines were reserved to him without his making any satisfaction in working. Compensation for any injury to any allotment was to be made by the occupiers of the other allotments in a prescribed manner. In an action by one of the owners against the lord's lessees, they pleaded the Act of Inclosure, the award, and an immemorial custom for the lord to work the mines under the waste lands without leaving any support to the surface, and without making any satisfaction for any injury. It was held, on demurrer, on the authority of Hilton *v.* Earl Granville (*q*), that such an alleged custom was invalid (*r*).

It was stated in the judgment in the above case, that Hilton *v.* Granville was a binding precedent, although it had been much shaken by the case of Rowbotham *v.* Wilson, which was decided in the House of Lords. Now, the former case related to copyhold lands, in which the mining rights of the lord are distinguishable from his rights in common lands for reasons which have already been discussed (*s*). That case, therefore, could not much affect the case of Rowbotham *v.* Wilson, nor that of Blackett *v.* Bradley, both of which related to inclosures. The case of Rowbotham *v.* Wilson was decided, on the ground that

(*p*) Rowbotham *v.* Wilson, 8 El. & B. 157; 25 L. J., Q. B. 362; (error) 27 L. J., Q. B. 61; (appeal) 8 H. L. Cas. 348; 30 L. J., Q. B. 49.

(*q*) See Chap. II.

(*r*) Blackett *v.* Bradley, 1 Best & S. 140; 31 L. J., Q. B. 65.

(*s*) See Chap. II. sect. 3.

the owners of the allotments were either bound by the award, or had bound themselves by special covenant, to forego the want of support, and to claim no compensation. If they were bound by the award, a complete exemption from liability was not considered to be so unreasonable as to be unlawful or invalid. The case of Blackett *v.* Bradley rested on the lord's previous rights. When the lord's right to work the mines of the common exists at all, it usually exists in that condition, and no claim for compensation is ever entertained. Unless it could have been shown that the unqualified right of the lord to work without support was impaired by contrary usage, or by other sufficient evidence, he must be considered to have retained the same absolute right after the inclosure; for the Act of Inclosure expressly reserved to him all his previous rights. It might have withheld or modified them. But it confirmed them; and, unless they were either shown never to have existed, or to have been illegal, these rights must have survived the process of inclosure.

It does not appear to be yet decided whether the right to support extends to buildings which have overloaded the surface since the time of severance. This question will probably be decided in favour of the mine owner (*t*). It seems, however, that if it can be shown that the land would have fallen in, even without the burthen of the buildings, the value of the buildings may be recovered, as resulting from the chief cause of action (*u*). The clause of compensation should be specifically extended to such cases, as well as to other consequences (*v*).

If a deed of conveyance is so framed as to lead to a reasonable inference that new buildings were then contemplated, compensation may be claimed under the usual

(*t*) Harris *v.* Ryding, supra. 871.
(*u*) Wyatt *v.* Harrison, 3 B. & Ad. (*v*) See Appendix of Forms.

clause for the damage occasioned to them, as well as to the land (*w*).

In all claims of support, no new easement or right as to new buildings can be acquired under the Prescription Act—if the mine owner is only bound to furnish the amount of support which sufficed at the time of severance. For all additional right of support must be considered to exist in a form so *precarious* as to exclude any adverse enjoyment, as of right, and any consequent presumption of a grant. The mines can be worked by their owner at his own pleasure and convenience—and no adverse right can arise against him by an exercise of discretion, or even by wilful delay. The property is his own—and he can deal with it at the time he thinks fit. Nor is he bound to exercise ordinary care, in working, for the preservation of any such new buildings, nor to give notice of any intended operations (*x*).

It does not appear clear that such a rule can be applied to copyhold lands. In the case of Hilton *v.* Granville, compensation was offered for injury to the surface as land, but refused as to buildings erected on the lands. On the trial of the action at bar, the jury found that the lord had by custom the right to work the mines without making any compensation for the injury done to buildings. It was stated, after the trial, that judgment would be moved for, notwithstanding the verdict. As the origin of a permanent tenure in copyhold lands is so remote, it might seem reasonable that the copyholder should have all the ordinary rights of ownership over the surface, in building and other improvements—particularly in cases where the mines have been long dormant, or where their existence has been unknown. On the other hand, it might be equally unreasonable that he should have the power to overload the surface in the midst of actual operations, and almost in the immediate anticipation of injury.

(*w*) Berkley *v.* Shafto, 15 C. B., N. S. 79.

(*x*) Partridge *v.* Scott, infra.

Again, it does not seem to be expressly decided in the above cases, that, if the modern practice of working all the coal without pillars had been considered to be fully established as a custom in the district, it would not have been justified. It might be urged, with some reason, that in cases of simple reservation, without any special powers, the grantees should enjoy all the fruits of modern improvement. This progressive right has already been recognized in rights of way and in the means of carriage (*y*). Neither does it seem to have been expressly decided in the above cases, that, if the custom had been well established at the time of severance, the acts of the defendants would have been justified. It will probably be finally concluded that such acts, in such cases, may be done. If so, a distinction may then prevail between powers arising under old and under more recent documents, which will apply to leases. It may, therefore, be sometimes prudent, in new cases of grant or reservation of horizontal strata, to prohibit, wholly or partially, these acts by express words.

In the case of Smart *v.* Morton, the defendants are stated to have offered to pay treble damages, according to the covenant. But this covenant was held to be no answer to the action on the case. The measure of damages in the latter case would consist of the damage actually sustained—which may include, not merely what must be expended in actual repair, but the diminution in the value of the property (*z*). It may also be remarked, that the injuries in the latter case might be prevented by injunction, which could not be obtained in cases of compensation by covenant.

If mines are improperly worked, so as to produce unnecessary injury, an action of trespass may be maintained (*a*).

The law relating to subsidence will also apply to cases

(*y*) See Chaps. IV. and V. Dand *v.* Kingscote.

(*z*) Bonomi *v.* Backhouse, E. & B. 622; 34 L. J., Q. B. 181.

(*a*) Littledale *v.* Lord Lonsdale, 2 H. Bl. 267.

where different strata in the same lands are held by different owners.

II. Mining operations may produce injury to the adjoining lands belonging to other owners, without any actual trespass on them, and particularly to buildings. In such cases, the right to work to the utmost extent of the boundary is subject to the same general rule that guards the concurrent rights of others. The lateral support which land requires in its natural state, unladen with buildings, is now also recognized as an inherent right of property (*b*), and is thus distinguished from an easement.

This right, however, only exists as a proprietary right, so far as the lateral pressure is not increased by buildings or by other artificial means. If an owner builds upon his own land so near to that of another that the latter cannot on that account have the full enjoyment of his land without injuring his neighbour's building, he will not be liable to an action for such an injury, even if he has not used ordinary care in his labour. For the former owner ought not to have built his house so near as to prevent his neighbour from making the best use of his own land. But this right of increased support may exist as an *easement*. If the house has had such support for twenty years, under circumstances from which such rights can be properly implied, the owner will be entitled to its continuance. If no such grant can be produced or presumed, no liability will be incurred with respect to increase of buildings (*c*).

(*b*) Wilde *v.* Minsterly, 2 Roll. Ab. 564, Trespass (I), pl. 1; Civ. L., l. 13, ff. fin. reg.; Code Civ. Nap. Art. 674; Humphries *v.* Brogden, infra; Brown *v.* Windsor, 1 Cr. & J. 20; Solomon *v.* The Vintners' Company, 4 Hurl. & N. 568; 28 L. J., Exch. 370; Bonomi *v.* Backhouse, infra, sect. 5.

(*c*) Wilde *v.* Minsterly, supra; Slingsby *v.* Bernard, Roll. Rep. 430; Stansell *v.* Jollard, 1 Selw. N. P. 441; Wyatt *v.* Harrison, 3 B. & Ad. 871; Dodd *v.* Holme, 1 Ad. & E. 493; Humphries *v.* Brogden, infra.

An action was brought against mine owners for injury to two houses, one of which was ancient, and the other modern, that is, built within twenty years before the act complained of. The mine owners excavated so near to their own boundary, in their own ground, as to injure the adjoining land and houses of the plaintiff. The houses were much within his boundary. The new house was built on land previously excavated in getting coal. It was not shown that the old house was built on land previously excavated, or that the land had been excavated more than twenty years ago. It was held by the Court of Exchequer, that the plaintiff could not recover. Alderson, B., in giving the judgment, said, the question was similar as to both houses. Rights of that kind must have their origin in grant. If one man builds his own house at the extremity of his land, he does not acquire any right of easement for support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbour's, unless he has some grant to that effect. If the land had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards, as they had done. If the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He had, therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants, unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There were no circumstances from which any such grant could be inferred as to the new house, because it had not existed twenty years; nor as to the old house, because it did not appear that the coal under it might not have been excavated within twenty years; and no grant could, at all events, be inferred, nor could the right to any easement become absolute, even under Lord Tenterden's

Act (*d*), until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendants' land. If the law stood as it did before that act, such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. Even since that act, the lapse of time, under these peculiar circumstances, would probably make no difference—for the proper construction of that act required that the easement should have been enjoyed for twenty years, under a claim of right. Here, neither party was acquainted with the fact that the easement was actually used at all, for neither knew of the excavation below the house. But that point was not raised (*e*).

When an easement of this kind has been acquired, regard will be had to the state of the fabric with respect to repairs or original construction, so as to impose no increased burthen on the other owner (*f*).

In another case, the declaration alleged negligence in working the mines, without leaving support *near and contiguous* to six cottages in the possession of the plaintiff's tenants. These cottages had been much injured by mining under other cottages near to them, but no mines had been worked under the plaintiff's cottages, while the reversion belonged to them. The mines had ceased to be worked in the time of their father, a former owner; but they had been worked, while the reversion belonged to the plaintiffs, a short distance from their soil, and the jury had found this working had caused the damage. It was shown, that the mines were worked according to the practice of miners, but that sufficient props or ribs of coal were not placed or left for the support of the surface, and that in such a soil the mines could not be worked in any mode without causing the surface to swag or sink. A verdict was found

(*d*) 2 & 3 Will. 4, c. 71.

(*e*) Partridge *v.* Scott, 3 M. & W. 220; 7 L. J., N.S., Exch. 101. See also Murchie *v.* Black, 34 L. J., C. P. 337.

(*f*) Ibid.

for the plaintiffs, and it was held in the Court of Exchequer, on motion to arrest judgment, that the declaration need not aver that the plaintiffs had a right to have the buildings supported by the soil under which the mines were got, as it did not appear that the soil belonged to the defendant, and he was *primâ facie* a wrong-doer (*g*).

In a case of lateral support, the jury had found that the injury was not occasioned by the weight of the new building, and the mine owner was held to be liable for damage done to it, as land. The house had been erected above twenty years, and it was intimated that, on that account, the liability was also incurred, for damage done to the property, as a house (*h*).

The question as to new buildings again arose in a suit for an injunction. But, as the evidence showed that the houses had no share in causing the subsidence, and that the foundation of the whole soil had been abstracted or injured, the case was decided on the same ground as that last cited (*i*).

But in another case, it was expressly decided, that the right of lateral support, even through intermediate lands, extended to buildings erected or enlarged within twenty years, *if their weight did not contribute to the subsidence*, and that the liability did not depend on any amount of skill in working the mines (*k*).

It is presumed, that if the plaintiff had erected new buildings in the plain prospect of subsidence, or had carried on business with the view of aggravating the damages, he would not have been allowed full damages. But, in other such cases, the value of new buildings may be recovered.

When the property injured is held under a lease, separate actions may be brought by the lessee and the reversioner.

(*g*) Jeffries *v.* Williams, 5 Exch. 792; 20 L. J., Exch. 14. See Raine *v.* Alderson, 6 Scott, 691; 4 Bing. N. C. 702.

(*h*) Browne *v.* Robins, 4 Hurl. & N. 186; 28 L. J., Exch. 250.

(*i*) Hunt *v.* Peake, John 705; 29 L. J., Ch. 785.

(*k*) Hamer *v.* Knowles, 30 L. J., Exch. 102.

In an action of this kind, it was alleged in the declaration, that a messuage and land had lateral support, which the defendant impaired by undermining and insufficient propping. Another count alleged, that the plaintiff was, by reason of her said interest, entitled to lateral support. It was objected, that the second count merely stated the right to support, without showing the title to it. It was held, that the defendant must be taken to be a stranger, and that both the counts were good (*l*).

It has been held, that the grantee of a copyhold estate cannot bind it, in the possession of an assignee, by a covenant to claim no compensation for injury by undermining; on the ground that he cannot disclaim compensation on the part of the lord (*m*).

When land is acquired for a special purpose, a vendor cannot afterwards disturb that purpose by working his mines too near, either in his subjacent or adjacent lands. In the case of a railway, which came before the House of Lords, the extent of the adjacent right of support was held to depend on the special circumstances of each case. If the line of division consists of hard stone, no support is required. If it be a bed of sand, or a marsh, or loose soil, a large breadth would be necessary; if a ploughed field, or a meadow, much less. There is an implied warranty of support, sufficient for the purpose which is contemplated by both parties. The railway company had a legislative power to purchase the mines within a certain distance, in order to prevent risk from working; but the absolute right of support is not affected by such powers (*n*).

Another case of this kind was carried to the final Court of Appeal. A railway act had authorized the purchase of lands and had excepted the minerals, which were to be worked by the owners on condition that no damage was

(*l*) Bibby *v.* Carter, 3 Hurl. & N. 153; 28 L. J., Exch. 182.

(*m*) Richards *v.* Harper, 35 L. J., Exch. 130.

(*n*) Caledonian Railway Co. *v.* Sprot, 2 Macqueen, 449; confirmed by Caledonian Railway Co. *v.* Belhaven (Lord), 3 Ibid. 56.

done to the railway and works. It was provided by another section, that, if the owners should approach within twenty yards of any masonry or building, they were to give notice to the company and might require them to give compensation for the minerals to be left for protection; and, if the company declined to purchase, the mine owner might work them in the usual manner, and without avoidable damage. The effect of these clauses was, that so long as the owners worked beyond the distance of twenty yards they worked at their own peril, and would be answerable for damages, however incurred; and, if they worked within that distance and the company refused to purchase, they might work on there without any further liability for damage than what might result from want of ordinary skill and care. No workings were made within that distance, and, therefore, no notice was given. The question was, as to the right of adjacent support. In 1835, the company had purchased the land under their act from an owner as part of his adjoining estate, and he was also entitled to the mines. At the time of purchase, the company contemplated the erection of a large and costly bridge over the river Wear, which was afterwards constructed; and the land had been procured for this notorious purpose at one end of the proposed bridge. It had been ascertained before the purchase, by the report of three experienced mining engineers, that many years ago the mines had been much worked, even under the land purchased, and that in 1791 they had been abandoned on account of the flooding of water from the river Wear. The pillars left for support were of such a thickness that, in the opinion of the engineers, the proposed bridge would have fourteen per cent. more power of support than it needed, and that the great hydrostatic pressure arising from the stagnant water in the shaft and in the workings gave an additional power of twelve per cent. In 1859, the defendant, who held the mines under a lease, began to pump out the water, and gave notice to the company of his intention to work the mines generally; and they filed a bill for

an injunction to restrain him from taking away any water or coal which was necessary for the security of the bridge. They alleged, on the authority of an eminent engineer, that there were two bands of fireclay, which formed part of the supporting pillars, and which were very liable to decomposition on exposure to air after long submergence in water.

The defendant did not allege in his answer, or in his affidavit, that damage might not be done to the bridge by his operations; but he stated that he did not desire to work the pillars, and he offered to undertake not to work within such a distance from the bridge as the Court might think reasonable without ample notice. It was admitted, on his behalf, that he was subject to the general rule as to lateral support, but it was urged, that for the purpose of injunction there must be evidence of an intention to do some unlawful act. It was held by Wood, V. C., that the plaintiffs had no right to assume that a mine owner would continue to allow his mines to be flooded for ever, that this was not the natural state of the ground, and that, as the company had not stipulated for such continuance, they could not insist upon it, and particularly as such a continuance did not appear to be absolutely relied on at the time of purchase. The defendant was restrained from taking away any of the minerals under the land purchased within twenty yards distance so as to occasion injury, unless he gave notice under the above-mentioned section, and the company refused to purchase the minerals; and also from working any of the minerals beyond that distance, so as to affect the stability of the bridge and works. The defendant was allowed to pump out the water from the shaft. The water in the old workings was not mentioned; and, in effect, the injunction would have prevented its abstraction on account of the alleged consequent decay of the pillars.

The defendant appealed from this decree, but it was affirmed by Campbell, L. C. He then appealed to the House of Lords, where it was again affirmed, but with an

important variation. The defendant was allowed to pump out the water from the old workings, as well as from the shaft. It was justly considered, that, if the company had no right to speculate on the perpetual presence of water in a drowned mine, the same presumption would arise with respect to the old workings as to the pit. Both might be essential for the further prosecution of the mine. If the pillars were liable to injury by the wasting of the fireclay in them, that fact might have been as well ascertained at the time of purchase; and the purchasers must be presumed to have relied on other means of escaping from the danger (*o*).

The right to lateral support applies to compulsory as well as to voluntary sales of land (*p*).

In cases of this kind an injunction can only be framed in general terms, leaving future operations subject to further application to the Court; as such operations cannot be defined, or anticipated as to their ultimate effect (*q*).

Although, in the case just cited, the bridge had been partially supported by the water for many years, no presumption of right could arise under the Prescription Act; as any such enjoyment is not adverse (*r*).

Interrogatories for discovery may now be put to parties to a suit under the Common Law Procedure Act, 1854, sect. 15. But they are subject to the same rules as in a Court of Equity.

In an action of trespass for undermining the surface, the defendants alleged the existence of deeds in the possession of the plaintiff, which would prove their title to work the mines. The plaintiff alleged in his affidavit, that the defendants had worked the mines wrongfully from adjoining mines, that the deeds in his possession related

(*o*) The North Eastern Railway Co. *v.* Elliott, 1 Jo. & H. 145; 29 L. J., Ch. 808; (appeal) 2 De G., F. & J. 423; 30 L. J., Ch. 160; (H. of L.) 32 L. J., Ch. 402.

(*p*) Ibid.

(*q*) Ibid. and The North Eastern Railway Co. *v.* Crosland, infra, Sect. 3.

(*r*) Arkwright *v.* Gell, supra, Chap. V.

exclusively to the title to the surface and the mines below, both of which he claimed, and that the deeds would not prove any title of the defendants to work the mines. It was held, that the plaintiff's answer was conclusive, and that the right of discovery did not exist (*s*).

Section III.

INUNDATIONS.—BARRIERS.

Frequent inundations are occasioned by accumulations of water in adjoining mines. The presence of these waters, is often unknown to all the owners till the accident occurs. The practice of leaving boundary barriers of unworked mineral, usually coal, sprung from this sort of embarrassment. But the careless manner in which many mines have been worked, the abstraction of part or all of the barrier itself, the boring of barriers by unclosed drifts, and even the wrongful working of the adjoining mine, afford frequent occasion to disputes, and to litigation. The law relating to this subject, of recent decision, seems to be sufficiently simple and rational. It is founded on the natural assumption, that water is the common enemy, which, whether open or concealed, each owner must combat for himself—and upon another different but consistent principle, that each owner has the full right to extract the greatest possible benefit from his property, and that, if, in so doing, he injure his neighbour, he will not be liable to action, if his acts spring from no malice, or mischief, and are simply consistent with a reasonable exercise of his own rights (*t*). For he ought not to be held responsible for the negligence of a neighbour who might have protected himself. The maxim, *sic utere tuo ut non alienum lædas*, cannot be put into the mouth of one who

(*s*) Adams *v.* Lloyd, 27 L. J., Exch. 499.

(*t*) Trower *v.* Chadwick, 6 Bing. N. C. 1; Smith *v.* Kenrick, infra.

has already violated it by acts for which he would make another suffer. The custom prevailing in most mining districts of this kind is conformable to this law. The mine owner works to the very end of his boundary on the dip of the beds, and leaves a barrier of his own mineral on the rise. Each owner thus fares alike, and each is, or ought to be, independent of the other. There is, in this first condition at least, no question of easement. The relation is entirely of proprietary origin.

If an upper owner trespass on the barrier of the lower owner, the former will be liable for the consequential damages, as well as for the trespass itself.

In the first case on this subject, which was not very decisive, the declaration stated, that the mines of the plaintiffs and the defendants abutted on each other, that the latter had trespassed and carried away coal from the mine of the plaintiffs, which would have formed a sufficient barrier against the water that had accumulated in the mine of the defendants, and had inundated that of the plaintiffs; and, therefore, that it became the duty of the defendants to make such provision that the water should not flood the plaintiffs' mine. It was held, that the declaration properly described the duty of the defendants, and that such an action might be maintained (*u*).

If an action on the case has been once brought for any such trespass, and disposed of, no other action can be brought for the continued flow of water; for an owner has no right to re-enter on the land of another, even to repair his own wrongful acts.

Thus, the plaintiffs were in possession of a colliery in Staffordshire from 1830 to the beginning of the suit, and since 1839, under a demise from the mortgagor of the property. The defendant had worked an adjoining colliery, which was on the rise previously to the demise, had trespassed into the other lower coal mine, and had

(*u*) Firmstone *v.* Wheeley, 2 Dowl. & L. 203; 13 L. J., N. S., Exch. 361.

made some openings and excavations in the coal of that mine, by means of which the roof of these excavations fell in, and the interstice became filled with water. Afterwards, the plaintiffs worked within a few yards of their boundary, where they found the waters, which inundated their mine. These trespasses were previously unknown to the plaintiffs. The defendant had ceased to work his own coal and to pump out the water. It was found by the special verdict, that the distance left by the plaintiffs would have been a sufficient barrier, if the defendant had not wrongfully trespassed. In 1841, the mortgagee brought an action on the case against the defendant for these trespasses, which was referred to an arbitrator, with liberty to the lessees and the mortgagor to become parties to the reference. Substantial damages were awarded to the mortgagee and the plaintiffs, and nominal damages to the mortgagor. The present action was afterwards brought by the lessees against the defendants for not closing the barrier. But it was held by the Court of Queen's Bench, that the action could not be maintained. Lord Denman, C. J., in giving the judgment, said, there was a legal obligation to discontinue a trespass or remove a nuisance —but no such obligation upon a trespasser to replace what he had pulled down or destroyed on the land of another, though he was liable in an action of trespass to compensate in damages for the loss sustained. The defendant, having made an excavation and aperture in the plaintiffs' land, was liable to an action of trespass—but no cause of action arose from his omitting to re-enter the plaintiffs' land to fill up the excavation. Such an omission was neither a continuation of a trespass nor of a nuisance, nor the breach of any legal duty. The flowing of the water and the damage were merely consequential, for which compensation had been made (*x*).

In another case, of great importance, Evan Jones and

(*x*) Clegg *v.* Dearden, 12 Q. B. 576; 17 L. J., N. S., Q. B. 233. See Taylor *v.* Stendall, 14 Ibid., Q. B. 301; 7 Q. B. Rep. 634.

his partners had been in possession of a colliery adjoining to another, and on a higher level. In 1844, the defendant succeéded him in the possession, but had no connection with him either in regard of privity of contract or of estate. Both collieries had been extensively worked when Jones began his work. There was then a barrier of coal belonging to the plaintiffs, wholly untouched, through which Jones made three large holes or drifts, called thyrlings. When the defendant took the mine, a large body of water, fed by springs, and on a higher level than the excavations in this mine, was separated from it by a thick stratum of coal belonging to that mine. The effect of removing this would be, that the water would flow through the drifts into the first or higher colliery, and then through the drifts into the adjoining mine. The defendant, knowing of these open drifts, and of the consequences, worked this bed of coal belonging to him, and the water flowed into the mine of the plaintiffs. It was held by the Court of Common Pleas, that the action was not maintainable. Cresswell, J., in giving the judgment, said, the want of privity prevented the defendant from being held liable to the trespass of Jones and his partners, and that the defendant had no right to enter into the plaintiffs' land to remedy the injury. In considering the broader question, how far he was of common right bound to prevent the water coming into his mine from flowing into his neighbour's, it was material that he had worked the barrier that protected his own mine in a manner most beneficial to himself, not unusual or negligent, or with any inferred design to injure the lower mine. The flow of water into the plaintiffs' mine could not be considered a trespass. But for the removal of the plaintiffs' coal, the water would have done no harm, and for that removal the defendant was not responsible. In all the cases which had been cited, to show a general liability, negligence was imputed. In that case the defendant had not caused but only permitted the flow of water. In the case of Firmstone *v.* Wheeley, the defendant had removed the plaintiff's barrier

by a trespass, and the Court appeared to have thought, that, having wrongfully done that, he was bound to protect the mine below from inundation; and if the action had been against Jones, the case might have been cited against him. But if Jones had been sued in trespass for removing the barrier, a second action could not have been maintained against him for the consequential damage done to the plaintiff's mine. If not, it would be singular if it could be maintained against a party unconnected with him for the consequential damages arising from his act of trespass. Treating it as a new question, it would seem to be the natural right of each of the owners of two adjoining coal mines, neither being subject to any servitude to the other, to work his own in the manner most convenient and beneficial to himself, although the natural consequence might be that some prejudice would accrue to the owner of the adjoining mine, so long as that does not arise from the negligent or malicious conduct of the party. In this case it could not be disputed, that, but for the excavation of the plaintiff's coal, the defendant would have been entitled to work out the whole of his own coal; for if the space which it had occupied became afterwards filled with water, that would have done no harm to the plaintiff, if his coal had not been excavated; and if he afterwards excavated his own, and the water flowed in from the defendant's workings, he would not on that account have any right of action for the damage done by it. What authority was there for saying that the plaintiff, by working his coal, could alter or abridge the defendant's right to work his own? It was reasonable that the plaintiff should leave part of his own coal to protect his own workings against the influx of water. The plaintiff left a barrier accordingly, which would have been sufficient, except for the act of a former wrong-doer. There were many cases where a landowner cannot, by altering the state of his land, deprive an adjoining owner of the right to use his own land. The case of Acton *v.*

Blundell (*y*) was also applicable. The water is a sort of common enemy, against which each man must defend himself, and this was in accordance with the civil law, by which land on a lower level owed a natural servitude to that on a higher, in receiving without claim to compensation the water naturally flowing down to it (*z*).

It would seem from this case that, though an owner may act in a selfish spirit, or with imprudence as to his own true interests, as in working his own barrier, he will not be prevented from bringing even ruin on his neighbour, if his acts can be attributed to no undue negligence or vindictiveness of feeling. When a lower owner, therefore, is stripped of his barrier, by himself or others, he may lie at the mercy of the upper owner. It is also held, that, in such cases, there is no obligation on an owner to give any notice of his intention of removal (*a*). In this condition, it may be inquired, whether any right of negative easement can be gained by the former owner, which may enable him to hold back the waters by the agency of the other.

If any easement of this kind can be acquired, its existence must be previously known to the servient owner (*b*). Thus, if a lower owner has exhausted his own barrier, and he relies on the unworked bed or barrier of his neighbour, no right can be gained against the latter owner if he is entirely ignorant of the abstraction of the barrier below; for the enjoyment is not *of right*. For the same reason, it may be supposed that, even with full knowledge, the enjoyment might be so much of a permissive or precarious character as to prevent any user as of right for the first period of twenty years. There might be at most but an implied parol licence or an acquiescence. Such a state of things would require the lapse of forty years before the right became absolute and indefeasible (*c*). It would also be

(*y*) See Chap. V.

(*z*) Smith *v.* Kenrick, 7 Com. B. 505; 18 L. J., N. S., C. P. 172. See Tenant *v.* Goldwin, 1 Salk. 360.

(*a*) Trower *v.* Chadwick, 6 Bing. N. C. 1; 8 Scott, 1.

(*b*) Partridge *v.* Scott, supra.

(*c*) See Chap. V.

requisite to show that the water was not so remote as to forbid the existence of an easement at all (*d*).

Although an owner of an upper mine may work to the end of his boundary, and allow the water to flow into the lower mine by gravitation, he will not be allowed to increase the burthen of gravitation by the introduction of any water that would not otherwise have descended. In a case of this kind, there were in each mine two beds of ironstone, a few fathoms apart. Each seam cropped out to the surface, and dipped down through both mines. Each owner had worked out the upper of the two beds, and no barrier had been left by either party. The upper owners made a passage from the first, or upper, seam to the second, or lower, bed for winning the latter—which was so constructed as to be on an incline from a part of the second seam to a part of the first seam—and the head of the passage in the second seam was at a higher level than the mouth of the passage in the first bed. The passage was made for getting the mineral in the usual skilful way: it was for carrying the ironstone from the second bed down to the first bed, and thence to the shaft communicating with the surface. While this purpose was effected, the water from the works in the second bed flowed down through it into the first bed, and onwards into the lower mine. The owner of this lower mine claimed damages. But the Court refused to give them, on the same ground of gravitation, as in Smith *v.* Kenrick, and because the passage had not been made for the purpose of turning the water into the plaintiffs' mine. But the defendants had pumped foreign water to a level high enough to cause an overflow into the mine of the plaintiff. This was for the purpose of getting other minerals lying deeper than the two beds, and the pump was so placed that a passage went from it to the head of the first passage, above men-

(*d*) See Haward *v.* Bankes, 2 Burr. 1113.

tioned, at such a level that the water from the pump flowed down the two passages into the first bed of ironstone, and thence into the plaintiffs' mine. It was held, that the defendants were liable in respect of this new water; as they had no right to interfere with the gravitation of the water, so as to make it more injurious to the lower mine, or advantageous to themselves (*e*).

The proprietors of a mill made a reservoir for collecting water, as well from their own lands as from adjoining lands of other owners. For this purpose, they employed a competent engineer and a competent contractor to select the site and complete the work. There was no personal negligence on the part of the mill owners. The workmen met with some old shafts, and the contractor did not provide sufficient support to resist the pressure of the water in the shafts. These shafts communicated with old mining works, which were wholly unknown to the mill owners and to the persons employed. The water penetrated into the plaintiffs' colliery below, which became flooded. It was held by the Court of Exchequer, that in the absence of negligence and of knowledge on the part of the mill owners, they were not required to exercise unusual care, and were not liable for the injury to the mine (*f*). Bramwell, B., dissented from this judgment, on the ground that the mill owners had caused "foreign" water to be sent down by artificial means into the plaintiffs' workings, as well as that flowing naturally from their own lands; and therefore that ignorance of the facts was immaterial. On appeal, this view of the case was affirmed in the Exchequer Chamber, where it was decided that the mill owners were liable (*g*).

The trustees of a turnpike road had diverted water from

(*e*) Baird *v.* Williamson, 15 Com. B. Rep., N. S. 376; 33 L. J., C. P. 101.

(*f*) See Trower *v.* Chadwick, 6 Bing. N. C. 903; 8 L. J., N. S., Exch. 268.

(*g*) Fletcher *v.* Rylands, 3 Hurl. & C. 774; 34 L. J., Exch. 117; 35 Ibid. 154.

an open ditch into a covered drain, and had placed catchpits with gratings for collecting the water into the drain. In wet seasons, these were insufficient, and the water, instead of escaping by the ditch, as before the alterations, overflowed the road and the adjoining land, and entered a coal mine. It was held, that the trustees were liable for the injury to the colliery, on the ground of negligence in respect of the catchpits and gratings (*h*).

It was also held, that the General Turnpike Act, which limits actions against trustees to three months "after the fact committed," did not apply to actions brought within that time for any fresh damage (*h*).

An injunction may be obtained to prevent the injuries which may result to other owners from the improper working of a mine, as in ordinary cases. In like manner, delay in applying to the Court will operate as a ground for refusing that summary remedy.

The Birmingham Canal Company were authorized by their act to make reservoirs for supplying the canal with water, and had applied to that purpose some pieces of water, called Broadwater, arising from the subterraneous communication of water in some exhausted coal mines. The defendants, who were proprietors of neighbouring mines, in consequence of a previous promise, gave the plaintiffs notice, in April, 1810, of their intention to open an old level, made for draining the exhausted mines, and at the expiration of six months to draw off the water, preparatory to working their mines. A counter notice was given by the plaintiffs that they would sue the defendants at law for damages, if they should proceed. The defendants proceeded, and in 1812, the plaintiffs applied for an injunction. But Lord Eldon refused to grant it, and left the plaintiffs to their remedy at law. He observed, that he

(*h*) Whitehouse *v.* Fellowes, 30 L. J., C. P. 305.

proceeded upon the circumstance of delay. The plaintiffs, instead of applying promptly to the Court to prevent the act, had permitted the defendants to expend 2,000*l.* in proceeding towards getting coal by erecting fire engines, and when they were about to get the coal, the plaintiffs came for an injunction. They ought to have commenced their opposition when they could have done so with justice, and, though this was not the case before Lord Hardwicke (*k*), of stopping a colliery actually working, yet the act of stopping or draining a colliery about to be wrought, might possibly, with reference to rival ownerships, be the means of making it absolutely unproductive twelve months thence, when it was to be wrought, instead of at the present time (*l*).

If the plaintiffs, in such a case, had established their right to damages by an action at law, the Court would interfere by injunction to prevent further injury (*m*).

A similar application was granted by Lord Thurlow, in a case where the plaintiff applied immediately after the commission of the injury. But he was directed forthwith to try his right at law (*n*).

In a later case, the inundation was imputed to a trespass committed more than fifty years ago, and there was much dispute as to the actual supply and course of the water. The Court, after an injunction for restraining the defendants from working in any places which might endanger the plaintiff's mines till answer or further order, and after the hearing of the cause, refused to make the injunction perpetual, but retained the bill and continued the injunction for one year, with liberty for the plaintiff to bring an action at law (*o*).

The former practice was to provide in the order for an injunction for the trial of the right in a Court of Law, in

(*k*) Anon., Amb. 209.

(*l*) Birmingham Canal Company *v.* Lloyd, 18 Ves. 515.

(*m*) Amb. 209.

(*n*) Robinson *v.* Lord Byron, cited 18 Ves. 517.

(*o*) Duke of Beauford *v.* Morris, 6 Hare, 340.

cases where the legal right was not admitted (*p*). But it is now imperative on a Court of Equity to determine such questions for itself (*q*).

The Court has also power to assess and award damages in all such cases (*r*).

Section IV.

OTHER INJURIES—PRIVATE AND PUBLIC NUISANCES.

Other injuries to the surface are usually provided for by compensation clauses.

In the absence of agreement, mining adventurers will, of course, be responsible for all injuries occasioned to the owners of property unconnected with the lands in which the mines are worked. The injuries arising from the poisonous or deleterious particles of mineral substances, or from the processes used in smelting or refining ores, will be liable to compensation by those who have prevented the full enjoyment of the ordinary advantages conferred by Nature. The loss of cattle and other valuable stock may thus fall upon the adventurer, unless these injuries are produced by the negligence or default of the owners or occupiers themselves. It may be observed, however, that the commission of a slight or insignificant injury will not suffice to render the miner liable. There must be some act which is worthy of redress (*s*). *De minimis non curat lex.* It should also be remembered that the prosperity of a mining country and its inhabitants depends upon the successful efforts of the adventurer. The value of all property in the vicinity of mines is inseparably associated with the spirit of adventure. The miner, therefore, should not be harassed in his operations by claims of an unsub-

(*p*) 2 Phill. 683.

(*q*) 25 & 26 Vict. c. 42; Copeland *v.* Webb, 1 N. R. 119.

(*r*) See Chap. XIII. sect. 2.

(*s*) See Taylor *v.* Bennett, 7 Car. & P. 329.

stantial or imaginary character; for the benefits he confers generally far surpass the injuries he may commit.

It sometimes happens, that injuries are produced from the working of mines in mountainous countries, by the rubbish and refuse of a mine being so placed by the adventurers as to be carried down from time to time by the floods of a stream. The water may be thus diverted from its natural and accustomed channel by repeated obstructions and accumulations; and may consequently inflict much mischief upon the lands adjoining to its course. If such an injury were proved against the proper persons, the proprietors of these lands, unless restrained by stipulation or prescription, would obtain damages for the injury sustained. The progress of such an injury, however, is often very gradual, and not easily distinctly attributable to the true causes. It might sometimes be very doubtful whether the injury could not be accounted for by natural or other causes, which may have operated to produce disorder on the banks of the river; or, at any rate, whether these other causes may not have materially aggravated the consequences of the acts of the adventurers. These difficulties in ascertaining the facts might also be accompanied with other objections to redress of a still more formidable character. There may be many mines which may furnish refuse to be carried down by the floods of a stream; and each mine may have been subject to a perpetual change of partners. In such cases, how is the remedy to be applied, if the facts were undisputed? At what particular time can the injury be said to be committed? The injury is gradual, and the real basis of it may, perhaps, be attributable to the operations of old adventurers, whose existence, either as a company, or as individuals, may have long ceased. The wrong may have been the slow growth of generations; and it would be unjust to entail the consequences of the negligence of former upon the present adventurers. It may have been produced by the combined acts of many different persons, interested in various

mines producing unequal quantities of earth and refuse, and who might have been entitled to the mining property, not only in unequal shares, but for unequal and variable periods. In such cases of difficulty, the remedy, it is feared, would become hopeless. But in cases of more simple occurrence it might be more practicable.

A watercourse which supplied a mill was lowered about four feet for half a mile in length by the working of iron-stone, but no actual diminution of water had yet occurred. The mine owner had prevented injury by raising the banks at his own cost, and had continued to prevent diminution as much as was possible. But the mill owner applied for an injunction to restrain further working on the ground, that irreparable injury might soon be suffered. The defendants were required to give an undertaking not to work their mines so as to interfere with the flow of water, or an injunction would be granted. The bill was retained, with liberty to apply at a moment's notice on the first approach of injury; and no costs were allowed (*t*).

It has already been stated, that a right to throw refuse from mines into a natural stream may be asserted either by prescription, or by custom (*u*).

Again, a continued user for twenty years will legalize a private nuisance (*x*). This user has not necessarily any reference to the persons who may first or successively come within its influence. The old notion of coming to a nuisance is not supported by recent authorities. The user may be said to be appendant to the land, and not to depend on the persons. An occupier or an owner in coming to his new dwelling is entitled to all the rights

(*t*) Elwell *v.* Crowther, 31 L. J., Ch. 763. See also Goldsmid *v.* The Tunbridge Wells Imp. Comm., 35 L. J., Ch. 88.

(*u*) Carlyon *v.* Lovering, 26 L. J., Exch. 251; 1 Hurl. & N. 784.

(*x*) Viner's Ab. Nuisances G.; Elliotson *v.* Feetham, 2 Bing. N. C. 134; Wright *v.* Williams, 1 M. & W. 77. See Gale on Easements, 275.

belonging to it, and he will, of course, be subject to all legalized annoyances (*z*).

In an early case, it was held, that in an action for using a lime kiln so near to a dwelling that the smoke scorched the fruit trees, it could not be pleaded that the cause of nuisance was erected before the plaintiff had any interest in the tenement (*a*).

In the late case of Elliotson *v.* Feetham, just cited, an action was brought for a nuisance, produced by workshops of an iron manufactory. The defendants pleaded a user of ten years before the plaintiff became possessed of his house. But it was held, that the defendants should at least have alleged a holding of twenty years' duration.

In another case, also just cited, the defendant pleaded a possession of three years before the coming of the plaintiff. But the plea was overruled. Tindal, C. J., said the defendant might be the first occupier—but the plaintiff came to his house clothed with all the rights appurtenant to it, one of which at common law is a right to wholesome and untainted air, unless the business has been carried on there for so great a length of time that the law will presume a grant from his neighbours in favour of the party who causes it (*z*).

The question of fact, whether the cause of complaint amounts to a nuisance or not, is for a jury to decide. Special damage must be shown. But it is no answer to an action by a private person, that the nuisance is indictable as a public wrong (*b*).

A smelting-house, adjoining to a field, whereby the grass was withered, and horses and cows were killed, has been long enumerated among nuisances (*c*).

(*z*) Bliss *v.* Hall, 6 Scott, 500.

(*a*) Assiz. Book, 4, pl. 3, p. 6. See Beswick *v.* Cunden, Cro. Eliz. 402; Moore, 353, 449, 599; Rolf *v.* Rolf, 5 Rep. 101; Penruddock's case, 5 Rep. 101.

(*b*) Chichester *v.* Lethbridge, Willes, 73; Crowder *v.* Tinkler, 19 Ves. 621.

(*c*) 1 Roll. Ab. P. 88, Action on the Case, pl. 6, 7.

In a late case, a proprietor was held to be entitled to damages for injuries occasioned to trees and shrubs by the vapours from large smelting works. A distinction was also drawn between nuisances which only produced personal discomfort, as in brick-burning, and those which produced material injury to property (*d*).

The increase of nuisances by larger volumes of smoke, or for any new purposes, or enlarged machinery, seems to be subject to the same law that prevails in the disturbance of river rights (*e*).

In a late case of a brick kiln, which had been erected within fifty yards from a country residence, an injunction was obtained to restrain the further burning of bricks as a private nuisance. K. Bruce, V. C., who was requested to decide the case without directing an action or issue, said, the plaintiff was entitled to untainted and unpolluted air, not necessarily as fresh, free and pure as at the time of building his house, but not rendered incompatible with physical comfort. The process of brick-making must communicate smoke, vapour and floating substances to the air, which, from the relative position of the two parties, must become mixed with the air supplied to the house and pleasure ground, without previous dispersion or diminution. This was an inconvenience, not fanciful, or as one of mere delicacy or fastidiousness, but materially interfering with the ordinary comfort of existence (*f*).

It was held, in one case, that a proprietor might burn bricks, with impunity, on his own land, and for building houses there, if he selected a proper place for the process, on the ground that some nuisances must be tolerated for a time for the public good (*g*). But in another case, pre-

(*d*) The Saint Helen's Smelting Company *v.* Tipping, 2 Best & S. 608; 4 Ibid. 616; 35 L. J., Q. B. 66 (H. of L.)

(*e*) Bankart *v.* Houghton, 27 Beav. 425; 28 L. J., Ch. 473.

(*f*) Walter *v.* Selfe, 20 L. J., C. C. 433; 4 De G. & S. 315.

(*g*) Hole *v.* Barlow, 4 Com. B., N. S. 334; 27 L. J., C. P. 207.

senting the same state of facts, the above decision was overruled in the Exchequer Chamber, where it was held, that, when a nuisance of that kind was sufficiently great, an action may be maintained, with due regard to the previous enjoyment of the plaintiff, but without regard to the fitness of the site selected (*h*).

It would seem, that, in cases of this kind, the attention of a jury may still be called to the fact of ownership, and to the means taken for preventing discomfort (*i*).

Brickmaking is not necessarily "a noxious or offensive business, trade, or manufacture," within the meaning of the Public Health Act, 11 & 12 Vict. c. 63, s. 64 (*k*).

It was the ordinary rule, not to issue an injunction for nuisance till it was established by trial at law (*l*). In one case, however, it was granted, where an action had been referred to an arbitrator, who found the existence of the nuisance by his award (*m*). By the Chancery Regulation Act, 1862, it is enacted, that every question of law or fact, pending in a Court of Equity, shall be determined there, with a power for the Court to send any question of fact before a jury at common law, if it can be more conveniently tried there. The Court will not refuse an injunction on the ground that an action at law establishing the right is under appeal, unless the propriety of the decision at law is doubted (*n*).

An injunction may now also be obtained at common law, after action brought, under the Common Law Pro-

(*h*) Bamford *v.* Turnley, 3 Best & S. 62, 66; F. & Fin. 231; 31 L. J., Q. B. 286. See also Beardmore *v.* Treadwell, 31 L. J., Ch. 892.

(*i*) Cavey *v.* Lidbetter, 13 C. B., N. S. 470; 32 L. J., C. P. 104.

(*k*) The Wanstead Local Board of Health *v.* Hill, 13 C. B., N. S. 479; 32 L. J. M. C. 135.

(*l*) The Att.-Gen. *v.* The United Kingdom Electric Telegraph Company, 31 L. J., Ch. 329.

(*m*) Broadbent *v.* The Imperial Gas Light Company, 7 De G. M. & G. 436; 26 L. J., Ch. 276; 29 Ibid. 377.

(*n*) Att.-Gen. *v.* Proprietors of the Bradford Navigation, 35 L. J., Ch. 619.

cedure Act, 1854, ss. 79, 82. An injunction under this act continues to operate against nuisances till it is discharged (*o*).

There is no obligation by common law on an owner or an occupier to maintain his own fences so as to prevent the trespasses of his neighbour. He is only bound so to maintain them as to prevent trespasses from his side. If, therefore, he dig a pit in his own land, he is not obliged to put a fence round it, to keep trespassers from falling into it (*p*). It seems, however, that a species of easement may exist, by which an owner must keep his fences good against the cattle of his neighbour (*q*), and must, therefore, fence his pits, as under the Hebrew law (*r*). This right is confined to cattle; and it does not extend to cattle of other owners straying into the land enjoying the easement (*s*). The fencing of pits in coal mines is now enforced by the Coal Mines Inspection Act (*t*).

It seems, also, that where no such obliging easement can be said to exist, there can be no remedy for injuries. Thus, it was held, if A. seised of a waste adjoining a highway dig a pit in the waste within thirty-six feet of the way, and the mare of B. escape into the waste, and fall into the pit, and there die, B. shall not have any action against A., for that the making of the pit in the waste and not in the highway was not any tort to B., but that it was by the default of B. himself that his mare escaped (*u*).

In a case just cited, it was held, that a man might law-

(*o*) De la Rue *v.* Fortescue, 2 Hurl. & N. 324; 7 H. of L. Cas. 276; 26 L. J., Exch. 339.

(*p*) Roll. Ab. 88, pl. 4; Jordin *v.* Crump, 8 M. & W. 788.

(*q*) Anon., Ventris, 256; Rooth *v.* Wilson, 1 B. & Ad. 59; Powell *v.* Salisbury, 2 You. & J. 391; Boyle *v.* Tamlyn, 6 B. & C. 337, per Bayley, J.

(*r*) Exod. xxi. 23.

(*s*) Dovaston *v.* Payne, 2 H. Bl. 527, per Heath, J. See 3 Wils. 126; Ricketts *v.* The East & West India Docks and Birmingham Junction Railway Company, 21 L. J., C. P. 201; 12 Com. B. 160.

(*t*) 23 & 24 Vict. c. 151, s. 21.

(*u*) Blythe *v.* Topham, 1 Roll. Ab. Action on the Case (P.), Nuisances; Cro. Jac. 158.

fully place dog-spears on his own land, traversed by a public footpath, without being liable to damage done to dogs deviating from the path but belonging to persons using the path. Alderson, B., in giving the judgment, said, the injurious act was done by the dog to the land of the defendant, and it was no answer that the plaintiff could not control the animal. If he chose to walk with his dog along a footpath where his dog might trespass, he knew the risk he was running—and the case was similar to that of a man who, passing in the dark along a footpath, should happen to fall into a pit dug in the adjoining field by the owner of it. In such a case the party digging the pit would be responsible for the injury, if the pit were dug across the road—but if it were only in an adjacent field, the falling into it would then be the act of the injured party. The case of Blythe *v.* Topham is an authority, that the fact of a trespass being involuntary makes no difference. The Court also held, that notice by the plaintiff of the existence of the spears made no difference (*x*).

In another case, a quarry was situate in a waste open to the public, and between two public highways leading over the waste. The quarry was unfenced, and the plaintiff, at night, in passing from one of the roads to the other, went astray and fell into the quarry. It was held, that there was no cause of action against the owners of the quarry, as it was not so near the road as to be a public nuisance (*y*), and there was, therefore, no obligation to fence it off (*z*).

Compensation may now be claimed by the representatives of persons killed by accident, arising from the neglect of others (*a*).

In a case under the act, the defendant excavated an area in his own land, and in front of his house, and left it

(*x*) Jordin *v.* Crump, 8 M. & W. 782. See also Bolch *v.* Smith, 31 L. J., Exch. 201; 7 Hurl. & N. 736.

(*y*) See Barnes *v.* Ward, infra.

(*z*) Hounsell *v.* Smyth, 7 C. B., N. S. 731; 29 L. J., C. P. 203.

(*a*) 9 & 10 Vict. c. 93.

open. A public highway closely adjoined to the area, and a passenger, walking with ordinary care, fell in and was killed. It was held, that an action was maintainable, and that the defendant ought to have fenced off the hole in the area. The case was distinguished from that of trespassers in a field. But it was held, that a voluntary trespasser, using a road with ordinary care, has a right of action for an injury (*b*).

A mine owner will also be liable in cases where no trespass has been committed. Thus,—A field and the mines under it were held by different occupiers. The mine owners had sunk a shaft in the field. On ceasing to use it, they placed an arch of stone over its mouth. They afterwards removed the arch, and the only protection then consisted of some branches of wood, with stones, laid over the shaft. A horse belonging to the occupier of the surface fell down it, and was killed, without any neglect on the part of its owner. There was no evidence of custom, or of any express stipulation. The mine owners were made liable for damages for the loss of the horse (*c*).

An entry may be made into the lands of another for the purpose of abating a nuisance, without notice, when the occupier has himself occasioned it (*d*).

A public nuisance does not differ in character from private nuisances, but it must affect several sufferers. The remedy is by indictment and suppression, and no time will legalize a public nuisance.

An injunction will also issue against a public nuisance (*e*). But in cases of doubt there must be a preli-

(*b*) Barnes *v.* Ward, 19 L. J., N. S., C. P. 195.

(*c*) Groucott *v.* Williams, 32 L. J., Q. B. 237. See Sybray *v.* White, 1 Mee. & W. 435; 5 L. J., Exch. 173.

(*d*) Jones *v.* Williams, 11 M. & W. 176; 12 L. J., N. S., Exch. 249.

(*e*) Att.-Gen. *v.* Forbes, 2 My. & C. 123.

minary trial at law, either on action, or on issues directed by the Court. When the subject of complaint is not unavoidably noxious in itself, but only something which may prove to be so, the Court will not interfere without trial (*f*).

The Act 1 & 2 Geo. 4, c. 41, relates to nuisances from furnaces and steam engines. But it is declared not to extend, as to payment of costs and alteration of furnaces, to owners of furnaces or engines for working mines, or smelting ores and minerals, or the manufacture of the produce of such ores or minerals, on or immediately adjoining the premises where they are raised.

Section V.

THE STATUTES OF LIMITATION.

When the remedy for injury is secured by covenants in deeds, as in the case of mining leases, it may be pursued at any time within twenty years from the commission of the wrong (*g*).

When the remedy is subject to the old statute relating to trespassers and personal actions (*h*), which prescribes a term of six years from the time of the cause of action, some doubt has arisen, in some cases, as to the time when the cause of action became complete. A cause of action may be complete in itself, although the consequences may become daily more aggravated. The cause in such cases must not be confounded with the consequences. From the first moment that an action might be brought, time will run, without regard to future results. These must often be estimated by anticipation. One action will comprise all future damages (*i*). Often the action may be

(*f*) Earl of Ripon *v.* Hobart, 1 Coop. 333; 3 My. & K. 169.

(*g*) 3 & 4 Will. 4, c. 42.

(*h*) 21 Jac. 1, c. 16, s. 3.

(*i*) Fetter *v.* Beal, 1 Raym. 339; 1 Salk. 11.

prudently suspended to the utmost limit, in order that the results may be more developed—for there can be no second action for the same cause. If a new result can be shown, from some new cause of action, of course another remedy arises.

In all cases, therefore, where a wrong has been actually committed, however unknown in its origin at the time, or however minute or invisible in its present effects, the time will run from that first commission (*k*). This rule will prevail in all cases of pure trespass, as in working out of bounds, and in other instances of direct injury. On the other hand, if the act is one that imports no wrong in itself, and that *may* never be productive of injury, then the statute will begin to run only from the time of actual damage. This *consequential* damage can only be dealt with as soon as it is actually sustained, and, therefore, only then becomes the origin of an action. Of this kind are the damages arising from burthening streams with refuse, from unlawful inundations, and from many private nuisances.

Thus, the General Highway Act, 13 Geo. 3, c. 78, s. 81, directs, that actions against any persons for any thing *done* or *acted* under the act should be commenced within three months after *the fact committed.* The surveyors undermined a wall adjoining the highway, but the wall did not fall till more than three months afterwards. It was held, that an action on the case might be brought within three months after the wall fell, for the consequential damage was the cause of action. If it had been trespass, the action must have been brought within three months after the act of trespass, but an action on the case for the consequential damage could not

(*k*) Short *v.* MacCarthy, 3 B. & Ald. 628; Buren *v.* Howard, 2 B. & Bing. 73; 4 Moore, 508; Howell *v.* Young, 5 B. & C. 259; Granger *v.* George, 5 B. & C. 149; Smith *v.* Fox, 6 Hare, 386; 17 L. J., N. S., C. C. 170.

have been brought till the specific wrong had been suffered (*l*).

In another similar case under a private statute, which enacted that the defendants should be sued within "six calendar months after the fact committed," the defendants dug soil out of their own dock, and undermined a wharf wall. Lord Tenterden held, that the limitation ran from the time of the consequential injury happening, and not from the doing of the act which caused the injury (*m*).

On the other hand, an action had been brought for injury done to houses by the working of mines, and it was compromised by the defendant undertaking to restore the houses to a good state of repair within a certain time. Afterwards the ground sunk again, and the houses were again seriously injured. Another action was brought, and it was held, on demurrer, that the agreement was a good answer to the action. Parke, B., in giving the judgment, said, it was not disputed that the agreement was an answer to the cause of action existing at that time, and the only question was, what was the cause of action? Was it the actual damage to the plaintiff's land or house, or injury to his right to have the land supported by a stratum of coal under and near it, so that when any part of the stratum necessary for support was withdrawn, there was a cause of action, though no actual damage was done? Every injury to the right imports a damage (*n*). The present action was for an injury to the right, and consequently there was a complete cause of action when the wrong was done, and not a new cause of action when the damage was sustained by reason of the original wrong. When so much of the coal or stratum was taken away as to deprive the plaintiff's house and land of the support to

(*l*) Roberts *v.* Read, 16 East, 215.

(*m*) Gillon *v.* Boddington, 1 C. & P. 541. See Sutton *v.* Clarke, 6 Taunt. 29; Lloyd *v.* Wigney, 6 Bing. 489.

(*n*) Ashby *v.* White, 2 Raym. 938; Embrey *v.* Owen, 6 Exch. 353; 20 L. J., N. S., Exch. 212. See Chap. V.

which he was entitled, a cause of action arose, although no actual damage accrued by the sinking of the land, or the falling of the house, or any part of it, or even by that part being cracked or displaced—although it would not be easy to prove that the essential part of the support was withdrawn, unless some actual effect on the land or structure was produced. For this reason, the plaintiff would have a right to recover the full compensation for the damage to the fabric, and if they had already obtained a verdict with damages, they must be presumed to be satisfied for all the consequences of the wrong—and if, instead of having the verdict, they had received, with their own consent, satisfaction, such satisfaction was to be considered to compensate for all the consequences of the wrong. The particular statutes, which directed actions to be brought within a certain period from the act committed, meant the limitation to run from the act that is the cause of action, but they did not appear to be for injuries to rights, as in that case, but solely for consequential damage (*o*).

But this decision has been overruled by an important case, which was carried before the highest Court of Appeal. In this case, the plaintiffs were owners of an ancient house, and the defendant had worked the coal mines both below it, and within a distance of 280 yards from it. The house was injured by the latter workings, but not till more than six years had elapsed from the commission of the acts to the commencement of the action. These acts were wholly unknown to the plaintiff. There was no allegation of improper working; and it was admitted, on the part of the defendant, that the case of Humphries *v.* Brogden was conclusive as to the right to lateral support. It was held by the Court of Queen's Bench, that the injury to this right, and not the consequential damage, was the cause of action, and that the

(*o*) Nicklin *v.* Williams, 23 L. J., N. S., Exch. 335.

Statute of Limitations ran from the time of the act which caused the damage. Wightman, J., dissented from this decision, and maintained that the action was founded on the breach of duty by the defendant in so using his property as to injure his neighbour, and that the cause of action did not arise till the damage occurred. The judgment was reversed in the Exchequer Chamber, and the reversal was confirmed by the House of Lords. Lord Cranworth observed, that the real right of the plaintiff was, not to the pillars left for support, but to the ordinary enjoyment of his land, and he had no cause of complaint till that was interfered with (*p*).

Section VI.

LIABILITY OF OWNERS AND AGENTS, MASTERS AND SERVANTS, CONTRACTORS AND WORKMEN.

Mineowners are, generally, responsible for the acts of their agents and workmen, in accordance with the maxim of law, *respondeat superior* (*q*). Thus, in an action against a manager appointed by the Court of Chancery on behalf of an infant, the manager employed a bailiff, who hired and dismissed workmen at pleasure, and directed the works of the mine. The manager took no personal concern in the business, and was not present at the time of injury. It was held, there was no pretence for bringing an action against the manager, and that such an action must be brought either against the hand that commits the injury, or the owner for whom the act is done (*r*).

Mines are often worked by temporary contracts with workmen, who are paid according to the amount of work

(*p*) Bonomi *v.* Backhouse, El. B. & El. 622; 27 L. J., Q. B. 378; (error) El. B. & El. 646; 28 L. J., Q. B. 380; (appeal) 34 L. J., Q. B. 181. See also Smith *v.* Thackerah, 35 L. J., C. P. 276.

(*q*) Littledale *v.* Earl of Lonsdale, 2 H. Bl. 268.

(*r*) Stone *v.* Cartwright, 6 T. R. 411.

done, or of mineral raised during the period. But the mine is never freed from the control of the owners. It is also usual for proprietors of mines to employ carriers for removing their ore to the smelting mill, or for delivery to the merchant. These persons usually contract with the owners for the conveyance of the ore at a stipulated rate, according to weight. In all these cases, these contractors must still be considered as the servants of the owners. If they are exclusively employed by the same persons, the mode of remuneration will make no difference, and if not so employed, they will stand in the capacity of servants *pro hâc vice*. If a person hires a coach, he is liable for any mischief done by the coachman while in his employment. It makes no difference whether the persons are employed in a *quantum meruit*, or are to be paid by a stipulated sum (*s*).

The owners will be liable to an action of *trespass* for specific acts expressly directed or sufficiently implied (*t*). In one case, it was held, that if a servant did work by order of his master, and the latter imposes a restriction in the execution of the order which it is difficult to comply with, and the servant breaks through the restriction, the master is liable in trespass. It was observed by Littledale, J., that in the case of two persons possessed of contiguous uninclosed lands, if one of them desired his servant to drive his cattle, but not to let them go upon the land of his neighbour, and the cattle went upon the land, the master would be liable in trespass, because he has only a right to expect from his servant ordinary, nor extraordinary care. If the servant uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arises from want of ordinary care, the master will only be liable in *case* (*u*).

(*s*) 1 Bos. & P. 409, per Heath, J.

(*t*) Lyons *v.* Martin, 8 Ad. & E. 512; Jarmain *v.* Hooper, 6 M. & G. 827; Freeman *v.* Rosher, 18 L. J., N. S., Q. B. 340.

(*u*) Gregory *v.* Piper, 9 Barn. & C. 591.

A master is not answerable for the wilful or unlawful acts of his workmen, nor for any acts done beyond the scope of his employment (*x*). But he is liable to an action *on the case* for acts of negligence done without express or implied authority (*y*).

Although a principal is not criminally responsible for the acts of his agent, he will be liable on an indictment, when he maintains works by his capital and employs servants, so as to cause a nuisance, for which an action on the case might be brought by a private person, if a public injury were not in question. Thus, a colliery owner who had not personally superintended the works, but who had given express orders to the workmen that the refuse of a mine should be deposited in a particular place, where it could have done no harm, and was not to be thrown into a navigable river, was not relieved from liability on an indictment charging him with obstructing the navigation (*z*).

It was once decided, that a principal was liable for acts done by the servant of a person who was himself the *sub-contractor* of the principal (*a*). But this case is overruled. It is now held, that when the owner of fixed property enters into contract for repairs, and parts with all control over the conduct of them, he is not liable for the acts of the contractor or his workmen (*b*).

In an action brought against a defendant, who had engaged a contractor to build a warehouse for him, the contractor's workmen made a deep excavation for the foundation, close to the boundary of the defendant's land, and the

(*x*) M'Manus *v.* Crickett, 1 East, 106; Morley *v.* Gaisford, 2 H. Bl. 442; Brown *v.* Copley, 7 M. & G. 559.

(*y*) Littledale *v.* Earl of Lonsdale, supra; Huggett *v.* Montgomery, 2 N. Rep. 446. See Pickard *v.* Smith, 10 Com. B. (N. S.) 470.

(*z*) Reg. *v.* Stephens, 35 L. J., Q. B. 251.

(*a*) Bush *v.* Steinman, 1 Bos. & P. 404.

(*b*) Burgess *v.* Gray, 1 Com. B. 578; 14 L. J., N. S., C. P. 184; Steel *v.* South Eastern Railway Co., 16 C. B. 550. See Gray *v.* Pullen, 34 L. J., Q. B. 265.

plaintiff's yard wall fell in. His house was also injured. Neither the house nor the wall had been built ten years, and they were not entitled to any support from the land of the defendant. It was held, that the action could not be maintained without proof that the plaintiff's buildings were entitled to support, and, therefore, that the defendant could not be liable for acts done on his own property, as the workmen were not his servants, and the acts were not done by his direction (*c*).

An employer is not responsible for damages occasioned by the negligence of a person employed by him in a lawful work, unless they stand in the relation of master and servant (*d*).

When an owner has given to adventurers a distinct estate or interest in the mines, whether by way of an actual lease or a licence to work, the responsibility arising either in respect of improper working, or the liability to pay simple damages for the injury committed, will be removed from the grantor to those carrying on the works; for they have acquired distinct rights in the property, for the management of which they are answerable. The lessors would not have been accountable for damages in such cases, if they had assigned the whole of their interest in the mines; and they grant a limited interest subject to the terms of the original grant or reservation, and the claims of all persons consequent upon such terms.

The personal injuries inflicted on workmen in the

(*c*) Gayford *v.* Nicholls, 9 Exch. 702; 23 L. J., Exch. 205. See Allen *v.* Hayward, 15 Ibid., Q. B. 99; Reedie *v.* The London and North Western Railway Company, 4 Exch. 244; 20 L. J., N. S., Exch. 65; Knight *v.* Fox, 5 Exch. 721; 20 L. J., N. S., Exch. 9; Peachey *v.* Rowland, 13 Com. B. 182; 22 L. J., N. S., C. P. 81; Ellis *v.* The Sheffield Gas Consumers' Company, 2 El. & B. 767; 23 L. J., N. S., Q. B. 42; Overton *v.* Freeman, 21 L. J., N. S., C. P. 52; Rupson *v.* Cubitt, 9 M. & W. 710.

(*d*) Butler *v.* Hunter, 7 Hurl. & N. 826; 31 L. J., Exch. 214.

course of their employment are discussed in a subsequent chapter.

Section VII.

CANAL AND RAILWAY COMPANIES.

In the acts for regulating canal companies, it has been usual to stipulate that, in the purchase of lands for the canal, the mines and minerals shall still belong to the old proprietors, who may work within a specified limit from the canal, and who are then required to give notice to the company of their intention to proceed further. The company are then empowered to enter and examine the works to see that they are proposed to be properly carried on, and, if they shall think fit, to purchase the mines at a valuation made with reference to similar property in the same vicinity. If the company should decline to purchase, the owners may proceed to work the mines; and it has been decided, that in consequence of such a refusal to purchase on the part of the company, the adventurers are not responsible for any damages which may be occasioned to the canal in prosecuting their works, unless the loss is occasioned by working the mines in an unusual and improper manner. The grounds for this decision will appear from the following cases.

The proprietors of the Wyrley and Essington Canal Navigation had obtained an act (*e*) which contained provisions of the above description. It was declared, that if the company, after receiving notice of the intention of the owner to work the mine, refused to inspect it within thirty-one days, the owner might proceed to work the mine under the canal to within ten yards from it, and if the company prevented him, they were required, within three

(*e*) 32 Geo. 3, c. 80.

months, to purchase the minerals at a price, to be ascertained according to the valuation or sale of adjoining mines. The owners of the mine, on the refusal of the company to purchase, continued to work it in the usual way till damage was sustained by a partial giving way of the sides and bottom of the canal. An action was brought by the company for the loss occasioned to their canal, but it was held, that the meaning of the act of parliament in requiring the owners of the coal to give notice of their intention to work it, and the liberty given to the company to inspect the works, and prohibit the owners, upon making compensation to them, from working within that distance, was for the purpose of enabling the company to purchase out the right of the coal-owners, if they thought their canal works likely to be endangered by the nearer approach of the miners; and that if the company declined to purchase, the coal-owners were left to their common law rights, as if no canal had been made, and they might take every part of their coal in the same manner as before the passing of the act. Their former rights had not been taken away by the act, which had only appropriated the surface of the land, and so much of the soil as was necessary for the canal, leaving the coal to be enjoyed by the owners as before; and the legislature had only given the land-owners a compensation for so much of the soil as they had deprived them of (*f*).

This subject was fully discussed in a later case, in which a similar action was brought by a canal company against the owners of a mine under an aqueduct belonging to the company. The language of the act of parliament (*g*) was considerably stronger in favour of the company. After the usual clauses, it was enacted, that it should be lawful for the owners of the lands to work all mines and quarries, provided that in working them *no injury was done to the navigation*. About eight years before, the aqueduct had

(*f*) Wyrley and Essington Canal Navigation Company *v.* Bradley, 7 East, 368.

(*g*) 16 Geo. 3.

sunk in consequence of the defendants having worked the mines under it, and it had been altered by the company, when the ground sunk a second time in consequence of the same cause, and the aqueduct becoming useless, the company altered almost the whole line of it, at a cost of 49*l.* 16*s.* For this sum an action was brought, and the amount recovered. But it was held by the Court of King's Bench, that the defendants were not responsible for the damage occasioned. It was observed by Mr. Justice Bayley, who delivered the judgment of the Court, that the plaintiffs had no rights except what were given by the act; the defendants had the property in the soil and mines, and all the rights of enjoying that property before the act, and they still retained all that the act had not taken away. After noticing the enactments of the sections relating to the case, and that the provisions of the act were at variance, the learned Judge said, these provisions were for the benefit of the company, who were relieved from the great expense of buying the minerals along the whole line of the intended canal, in the first instance, before it was constructed, and were enabled to postpone the purchase of them until the time when, from the state of the market in the neighbourhood, the owners really wanted to get them. When this happened, the company had an option, either to buy, in which case the landowner could not get the minerals, but was fully compensated for the loss of that right; or not to buy, in which case he received no compensation at all, and his right to get them ought to remain as complete as if no canal had been made. In the latter case, the canal company had not paid for, and ought not, therefore, to obtain under the act, the right to prevent the landowner from enjoying his own property; and if he exercised his right of enjoyment, the company ought to run the risk of the consequences. The general benefit of the canal was never considered in such cases. So far the provisions of the act were clear. The doubt arose from the proviso, "that in working such mines and

quarries no injury be done to the said navigation." If this proviso was to be construed literally, it was inconsistent with a preceding section; for if the owner in working mines was to be responsible *at all events* for any injury or damage done to the canal, would the company ever purchase the minerals from such an owner? The provision as to the purchase would be nugatory. The only reasonable mode of reconciling those sections was to say, that the proviso was to be construed with some qualification, viz., either that the party working the mines was to do no unnecessary damage to the navigation, or no extraordinary injury by working them out of the ordinary and usual mode. With that limitation all the parts of the act were consistent with each other (*h*).

In another similar case, a canal act had prohibited any working of minerals within twelve yards without the consent of the company, with usual stipulations allowing inspection to the company, power to purchase, and, in case of refusal, making them liable to compensation. It was also provided, that the right of the mine-owners should not be affected, and that, subject to the conditions of the act, they might work all the mines, if no injury was done to the navigation. The company was served with notice, but they did not inspect, nor prohibit the working, nor offer to purchase. The mine owner continued to work in the ordinary way within the twelve yards, and a canal reservoir was damaged. No negligence was imputed in the special case, which was stated by consent, except so far as proper support should have been left for the reservoir. It was held in the Exchequer Chamber that the case was within the case last cited, that the last proviso must be construed in subordination to the other clauses, and that no action by the company could be maintained (*i*).

(*h*) Dudley Canal Navigation Company *v.* Grazebrook, 1 Barn. & Ad. 59. This case overrules that of Birmingham Canal Company *v.* Hawksford, cited 7 East, 371, in which there was exactly the same proviso. See the act 23 Geo. 3, c. 92.

(*i*) The Stourbridge Canal Company *v.* Dudley (Earl), 30 L. J., Q. B. 108.

By a local canal act, no mine owner was allowed to work under or within twenty yards of any tunnel. If any such owner wished to work, he was to give notice, and the company, in case of refusing permission, were to pay him compensation in the usual way. The plaintiffs, who held the coal under a tunnel as lessees, had covenanted with their lessors to work and exhaust the whole of the coal, or as great a quantity as by working in a diligent manner could be got, except "the ribs and pillars which must necessarily, or which the said lessors might require to be left." The company refused permission to work, and the jury assessed a sum of money to be paid by them to the plaintiffs for ceasing to work. In an action for recovery of this sum the company pleaded, that the mines so abandoned and the unworked coal formed a rib within the meaning of their covenant, and that the lessors required the coal to be left for such rib, and that one requirement effectually coincided with the other—also, that the plaintiffs had not ceased to work within twenty yards of the tunnel, and that they had abandoned their notice, before the jury was summoned, and had worked within that distance. It was held, that the covenant only amounted to an exoneration of the plaintiffs from working the whole of the coal—that, even if it were strictly a covenant, the lessors would not have the absolute power of dictating where coal was to be left, and therefore, that the lessees might still work—that, if an action for breach of covenant was brought by the lessors, the damages might not be commensurate with the value of the coal worked out—and that the notice could not have been abandoned without consent of the defendants. The pleas were, therefore, overruled (*k*).

The grounds of these decisions cannot be disputed. If no canal had been made, the owner would have had the

(*k*) Swindell *v.* The Birmingham Canal Navigation Company, 29 L. J., C. P. 364.

right to work his minerals without being liable to injure the property of others; and he is not to be deprived of that right, without which the mere right of property in the minerals reserved to him would be worthless, unless the terms of compensation had extended to the loss which would otherwise be sustained by him.

Provisions of the same kind were usually inserted in railway acts, to which the preceding decisions will apply.

It is also usual, in both canal and railway acts, to give full power to the company, or their agents, to enter the adjoining mines, in order to ascertain the distance of the works from those of the company, and to see if the mines are properly worked.

Several provisions with respect to mines are contained in the Railway Clauses Consolidation Act (*l*). The companies are not entitled to any mines, except such parts as are "necessary to be dug or carried away, or used in the construction of the works," unless they are expressly purchased—and they are deemed to be excepted out of the conveyance to the company. The mines near the railway are not to be worked for forty yards, if the company are willing to purchase; the value, in case of dispute, to be fixed by arbitration. If the company will not purchase, the owner may work them, and is made liable for any improper working. If the working is prevented by apprehension of injury to the railway, air-ways and water-levels may be cut, within eight feet in height, and in width, but not in the railway or the works. The companies are required to compensate for severance, interruption of continuous working, or for working under special conditions so as not to injure the railway, for minerals which are not purchased, and which cannot be got on account of the

(*l*) 8 Vict. c. 20, ss. 77—83; 8 Vict. c. 19, s. 33 (Scotland); 14 & 15 Vict. c. 70 (Ireland).

railway, and for the costs of making any such air-ways and water-levels. The companies are empowered to inspect the mines, under a penalty of 20*l.* for refusal. If the mines are worked contrary to the act, the company may give notice, to the owner, to adopt means for making the railway safe, and, in case of neglect, may take such means themselves, and recover the costs by action.

A local railway act empowered a company to take lands, excepting the mines, on paying the value of the lands and making compensation for damages sustained in the execution of the works or under any of the powers of the act, and in making alterations for the use of the railway by the owner of a coal mine. The compensation was directed to be fixed by agreement, or, if necessary, by a jury, in which case the compensation was to comprise damages already sustained, and future temporary, perpetual or recurring damages. The mines might be worked by the owner, so that no damage should be done to the railway, and, in case of damage, the owner was to repair it at his own cost. Land was taken, and the amount was agreed on, and paid to the owner, without taking the coal mine into account. The owner afterwards worked the mine, damaged the railway, and found that the mine could not be worked without doing damage to the railway, and claimed further compensation for the sum it cost him to repair the damage done, and for interruption to the working of the mine. It was held, that such compensation for contingent loss should have been claimed at the time of the original agreement or assessment (*m*).

When a canal or railway act does not compel any purchase by the company, and full compensation has been prospectively given to the landowners, the latter may be

(*m*) R. *v.* Leeds and Selby Railway Company, 3 Ad. & Ell. 683; 5 Nev. & M. 246.

obliged to leave the minerals without any further recompense. Thus, a canal act directed that, on the lands being entered, a jury was to assess the purchase sum to be paid, and also what other sum should be paid, either for the damage which had been previously sustained, or for the future temporary or perpetual *continuance of any recurring damages*, the cause of which should have been only in part obviated or repaired, and which could or would be no further obviated, repaired or remedied. All the mines were reserved to the landowners, with power to work them, on condition of doing no injury to the canal. Power was given to the company to enter and examine any mines, and to require the persons working to desist, if the mines had been worked in contravention of the act. There were no clauses for purchase of the mines, or for compensation. When the lands were taken, it was known that there was coal within them. The purchase sum was agreed upon, and no question was raised as to any special compensation for damage. On the coal being begun to be worked by a lessee, whose interest accrued after the conveyance of the land, the company required him to desist. It was held, that the lessee was not entitled to any compensation, that the clause as to recurring damages was not applicable, and that the original purchase sum must be held to have included all compensation (*n*).

All future injuries are within the 68th section of the Lands Clauses Consolidation Act, 1845. A railway company and a landowner had referred to voluntary arbitration the amount to be paid for a right of tunnel in full compensation for all injury *to be sustained*. A sum was awarded for the right to construct, and for all injury *sustained by reason of the construction of the tunnel*. A conveyance was then executed by the landowner, in which

(*n*) Reg. *v.* Aire and Calder Navigation Company, 30 L. J., Q. B. 337.

the sum awarded was declared to be in full for the site of the tunnel, and its use for the purposes of the company's act, freed from all claims of the grantor. The bed of the tunnel consisted of clay and loose earth, and injuries were occasioned to the buildings on the surface by subsidence and vibration. The landowner claimed further compensation under the above section. But it was held, that those injuries might have been foreseen and assessed prospectively by the arbitrator, and that the plaintiff was precluded as well by the construction of the submission, award, and conveyance, as by the statute (*o*).

In compensation cases under the Lands Clauses Act, the verdict of a jury is only conclusive as to amount, without prejudice to any disputed right to resist the claim elsewhere on legal grounds (*p*). The same rule applies to companies under acts containing special provisions of the same kind (*q*).

When minerals are not expressly purchased by a company, and are, therefore, considered to be excepted out of the conveyance under the Railway Clauses Act, the company may prevent the mines from being worked by a subsequent purchase; but they cannot prevent the owners of the mines from working them, if no purchase is effected (*r*).

When a company has only acquired the right to make and maintain a tunnel through land, without the grant of the land itself, they will be subject to the compensation clauses in the same way as if they had actually purchased the land; and, therefore, the mine owner will be under no

(*o*) Croft *v.* The London and North Western Railway Company, 32 L. J., Q. B. 113; 3 B. & S. 436.

(*p*) Reg. *v.* The London and North Western Railway Company, 3 El. & B. 443; 23 L. J., Q. B. 185; Read *v.* The Victoria Station and Pimlico Railway Company, 1 H. & C. 826; 32 L. J., Exch. 167.

(*q*) Barber *v.* The Nottingham and Grantham Railway Co., supra.

(*r*) Fletcher *v.* The Great Western Railway Company, 4 Hurl. & N. 242; 28 L. J., Exch. 147; 29 Ibid. 253; The Great West. Rail. Co. *v.* Bennett, 36 L. J., Q. B. 133.

obligation to leave sufficient support for the tunnel, if the company decline to purchase (*s*).

In cases where those clauses cannot apply—as when a railway is not made under parliamentary powers—the right of mining will still exist, but with liability for damages, and, in some cases, to an injunction, unless there are special stipulations to the contrary. For a grantor must not derogate from his own grant.

When land can be taken under the compulsory powers of railway companies, only as a whole, and not in part, a company cannot propose to make a tunnel under the property, without purchasing the surface. In cases of doubt, the construction of Acts of Parliament is in favour of those who seek to protect the land (*t*).

In a case of compensation under usual powers, an agreement was made by the company with the owner of a mine for the purchase of the coal at a certain sum. But the coal was then worked under a lease from the owner, and the compensation did not include the interest of the lessee. The coal under the canal and the towing-path was not comprised in his lease, but he did not know that the company would require any breadth of coal on each side. He knew he was not to injure the canal, and he did not injure it; but the company did not for many years give any notice as to the quantity of coal to be left. It was held, that the lessee had a right to get the coal to sell it for what he could, on paying the rents, and that, as on this dealing there might have been profit, the lessee was also entitled to compensation for the loss of his interest in the coal (*u*).

In a railway act passed in 1830, the mines below were excepted, with full powers to work them, on condition of

(*s*) The London and North Western Railway Company *v.* Ackroyd, 31 L. J., Chanc. 588.

(*t*) Sparrow *v.* The Oxford, Worcester and Wolverhampton Railway Company, 2 De G. M. & G. 94; 21 L. J., N. S., C. C. 731.

(*u*) The Barnsley Canal Company *v.* Twibell, 7 Beav. 19; 13 L. J., N. S., C. C. 434.

causing no damage or obstruction to the railway. There were special provisions for repairs, in case of any such damage or obstruction, and for the recovery of expenses of repairs by the company, in case of omission on the part of the landowners. Under this act, several purchases for small sums had been effected for a right of tunnel, without the grant of any part of the land itself—and one purchase, which included part of the surface, was for a large sum. Another act of another railway company passed in 1836, with which the former railway company was afterwards incorporated, containing the usual clauses of exception of mines, notice of intention to work, option of purchase, and compensation. The tunnel was then completed and opened for use. The two railway companies were afterwards amalgamated under an act passed in 1844, which repealed the act of 1830, but with a proviso, that the repeal should not annul or affect any purchase, conveyance, matter or thing theretofore done or executed under the repealed act. It was also enacted, that all the powers and provisions of the act of 1836, *so far as they were not repealed or altered by this act*, or by any statute, should extend to this act, and to the works and lands of the company of 1830. The mines under the railway and the tunnel had been acquired by an owner, who gave notice of his intention to work them under the act of 1836. The value of the minerals to be worked was estimated at a large sum; and it was admitted, that danger to the railway might be occasioned in working them. On a bill being filed by the company, a perpetual injunction was decreed for restraining the mine owner from working the minerals either directly below the railway, or laterally, so as to injure it. It was held, that the act of 1844 transferred the land to the new company, with the mutual mineral rights previously existing, and did not bring the minerals within the clauses of the act of 1836—and that, independently of this view, a

common law right of support was acquired by the purchase of 1830 (*x*).

Injuries are sometimes done to mines from ordinary floods, leakage of reservoirs, and other causes, for which public companies may be answerable.

In a case of this kind, a company had constructed their railway through a cutting over the mines, which were not then worked immediately underneath. When the mining works had been advanced towards the cutting, the owners gave the usual notice to the company, who declined to purchase, and the works proceeded with proper care. The surface had been clay, which was impervious to water, and the cutting had exposed a porous rock. The soil and clay had also been abstracted along the line to a district which was drained by a brook. The railway was carried over the brook by a bridge, where the line sloped downwards to part of the mines. The bridge sufficed for the passage of the usual quantity of water, but proved to be an impediment in large floods. The company was bound to make and maintain proper drains. During a flood, the water was stopped by the bridge, flowed down the railway into the cutting, and thence into the mine. The railway afterwards began to sink. The company threw materials on the subsiding parts, but did not puddle the drains, which would still have been insufficient for the flood. The usual rain and spring water also went into the mine. It was held, that the company, having failed to maintain proper drains, were liable to an action for the injury to the mines, and that the plaintiffs were not bound to have proceeded under the compensation clauses of the railway act (*y*).

(*x*) The North Eastern Railway Company *v.* Crosland, 2 Jo. & H. 565; 32 L. J., Chanc. 353.

(*y*) Bagnall *v.* The London and North Western Railway Company, 7 Hurl. & N. 423; 31 L. J., Exch. 121; (error) Ibid. 480.

The Railway Clauses Act, 1845, sect. 69, gives a power to justices to determine disputes between railway companies and the owners and occupiers of adjoining lands respecting *accommodation* works. An attempt was made, in the case last cited, to bring the company within this clause, and the justices granted an order for repair of the drains. But it was held by the Court of Queen's Bench, that the expression, "accommodation works," must be construed with reference to the state of things existing at the time when the works were made—that the section only applied to matters on the surface of the land—and that the justices had no jurisdiction (*z*).

A private Act of Parliament, which incorporated a gas company, contained a clause that if the company should cause or *suffer* to be conveyed, or to flow into any stream or place for water, any washing produced in making gas, or do any act to the water, whereby it should be fouled, they should forfeit a penalty. The site for the gas tank was selected, and it was completed with all ordinary care and prudence. It was known to the company that mines had been worked in the neighbourhood, but not in their own lands. After some years, the tank cracked, the washings escaped, and polluted the water in the plaintiffs' well. It was then found, for the first time, that the mines underneath and close to the tank had been many years ago worked by former owners. It was held, that there was presumptive proof of negligence on the part of the company, which they had not rebutted—that the act required absolute immunity, and not ordinary care—and that they were liable to the penalty (*a*).

In an action for compensation against a canal company for the leakage of a reservoir, it was pleaded by them that the nature of the soil was so porous, that the water

(*z*) Reg. *v.* Fisher, 3 B. & S. 191; 10 Cox, C. C. 155; 1 L. R., C. C. 21; 32 L. J., M. C. 12.

(*a*) Hipkins *v.* The Birmingham and Staffordshire Gas Company, 5 Hurl. & N. 74; 6 Ibid. 250; 29 L. J., Exch. 169; (error) 30 Ibid. 60.

escaped by the sides of the reservoir, and not by any works constructed under their act; and that the shafts and works of the mine owners, the plaintiffs, naturally induced the water to overflow. It was held that the water would never have been so much accumulated, except under the powers of the act—that the obligation to prevent leakage was absolute—and, therefore, that the plea was bad (*b*).

The act for authorizing waterworks for supplying towns with water contains special provisions with respect to mines (*c*).

(*b*) Barber *v.* The Nottingham and Grantham Railway Company, 15 C. B. (N. S.) 726; 33 L. J., C. P. 193.

(*c*) 10 Vict. c. 17, s. 22.

CHAPTER XII.

THE RATING OF MINES AND QUARRIES.

Part I.

THE POOR RATE.

I. *Coal Mines and Rights of Way.*
II. *Mines in general.*
III. *Quarries.*
IV. *The Irish Act.*

Part II.

THE COUNTY RATE—THE HIGHWAY RATE—THE CHURCH RATE.

Part I.

THE POOR RATE.

Section I.

COAL MINES AND RIGHTS OF WAY.

I. By the statute of Elizabeth (*a*), competent sums of money for the relief of the poor were directed to be raised by taxation of every inhabitant, and of every occupier of lands, houses and *coal mines* in the parish.

Coal mines are thus expressly made liable to the poor rate.

It was observed on one occasion, that there was a very good ground for exempting other mines, as from the

(*a*) 43 Eliz. c. 2, s. 1.

nature of working them they were liable to more hazard and expense than coal mines (*b*). It cannot be denied that coal adventurers may calculate with greater certainty upon the actual existence of the mineral than those in search of the metallic ores. Coal is certainly found in a state of stratification, but it is an erroneous notion to suppose that, for this reason, it is always not only easily discovered, but easily produced.

In remoter periods coal was produced near the surface, of adequate quality, in sufficient quantity, with great exactness, and at little expense. If the mine failed in its produce from causes proceeding from geological disturbances, or casual misfortune, the labours of the miner were only directed to another, and, perhaps, an untouched field. Such may still be the case in less exhausted districts. But in more recent times, and in those districts whose produce is the most valuable, the mineral must be sought for in deeper and more dangerous recesses, the labours of the miner become more extensive, more hazardous, and more costly, and the interruptions of nature, or those arising from the imperfection of human contrivance, are more difficult of provision. In the extensive coal districts of the North of England, an expenditure to the amount of 20,000*l.* or 30,000*l.* is very frequently required, previous to the actual working of the coal. The expense often far exceeds either of those sums, and a sum of even 200,000*l.* is, under some circumstances, scarcely sufficient to answer the demands of the adventure. A single accident may occasion a loss of 50,000*l*, and it may happen, after all, that the enterprise may become totally impracticable, or that the cost of production may exceed the revenue of the mine (*c*).

The difference between a *lease* of mines and a *licence* to work mines has been often pointed out in the course of

(*b*) Governor & Co. for Smelting Lead *v.* Richardson, 3 Burr. 1341; 1 Black. Rep. 389.

(*c*) See 19 Ves. 159.

this work. A lease of mines or minerals confers upon the lessees an actual estate in lands, in respect of which they may bring an action of ejectment. There can be no doubt, therefore, that lessees of coal mines are liable as occupiers to the rates for the relief of the poor. On the other hand, a licence to work mines confers no actual estate in the mines themselves. The right of possession of the minerals only becomes vested in the grantee when they are severed from the freehold. This liberty to work does not necessarily exclude the similar rights of others. A licence, therefore, to work mines is a mere incorporeal hereditament, a right, a privilege. Property of this description is not, in itself, generally rateable; and it may thus be a question whether the lessor or the adventurers are liable to be rated. In one case of a licence to work mines, it was observed (*d*) by Lord Tenterden, that the adventurers had not the sole occupation of the mine. Lord Wynford also remarked, that all the adventurers took under the indenture was a licence to enter and dig for minerals; that then a division of the ore took place between them and the landlord, and that this was the same as if, instead of working for wages, they worked on condition of being paid by a certain share of the produce.

On another similar occasion, it was observed by Parke, J., that the grantor of a licence might himself be the occupier by his agents (*e*).

It must be observed, however, that these dicta were pronounced in cases of licences to work mines not liable to be rated, and in order to support the doctrine with respect to the liability of the lessor for the minerals reserved. This subject will be afterwards discussed. But it is quite distinct from that under present consideration. In those cases the lessor was rated, not as the occupier of a *mine*, but as the occupier of *land*. It will be seen in the next

(*d*) Rex *v.* St. Austell, 5 Barn. & Ald. 693.

(*e*) Rex *v.* Tremayne, 4 Barn. & Ad. 162.

section, that the grantor of a licence is not considered to be so far in the occupation of the mine as to be exempt in respect of his part of the produce. The present question is, whether the grantees of a licence to work coal can be properly considered the occupiers of a coal *mine*, with respect to its general produce.

It has been seen in a former part of the treatise, that the grant of a licence to work mines confers an interest in lands, and that such an interest may become irrevocable and indefeasible by its being granted for a valuable consideration. It may also be incapable of being disturbed by the lessor or those claiming through him under a similar grant. The grantee of such an interest has, in such cases, an exclusive right to the possession of the mine against the lessor and all other persons, though he acquires no direct and actual interest in the mineral till it is severed from the inheritance. He is, therefore, to all intents and purposes, the occupier of a mine.

In a cognate case, the Trent and Mersey Navigation Company had entered into an agreement with several proprietors of limestone quarries, who agreed to deliver to them such a quantity of stone as the company should yearly direct, at a certain price; and in case of neglect or refusal to do so, it was declared that *it might be lawful for the company to enter and take away* as much stone as they thought proper, paying for it after a reduced rate. The company afterwards found it necessary, in consequence of the refusal of the proprietors, to enter and work the quarries, and they were rated for the property. The case was sent back by the Court of King's Bench to the Quarter Sessions to ascertain whether there had been an *exclusive possession* by the company. Affidavits, however, were prepared, to the effect that no other person had ever worked stone there but the company. Lord Tenterden, in delivering the judgment of the Court, said, that the question had come before them under peculiar circumstances, and that no case on the subject had been discovered. The right of the

company was merely to get there what stone they might think fit; there was nothing in the contract to prevent the owner from giving to others also the privilege of getting stone in the quarry. The company, therefore, had not any sole and exclusive occupation, but a mere privilege, and, consequently, were not liable to be rated (*f*).

There was no allusion in this decision to the distinction between a lease and a licence with respect to their conferring a right of possession or occupation. The grantees were not held to be liable on the ground that the licence was not shown to confer an *exclusive* right of occupation. If this can be shown, it is submitted, the adventurers will, in all such cases, be the proper parties to be rated. If such an occupation cannot be established, it would seem the lessor will be the person liable to be rated as the occupier; for it would otherwise happen that the mine could not be rated at all.

We may now consider the mode of rating a coal mine.

An act has been passed for regulating parochial assessments, and for establishing one uniform mode of rating throughout England and Wales (*g*). It was enacted, that no rate for the relief of the poor should be of any force, which should not be made upon an estimate of the *net annual value* of the property rated, that is to say, of the rent at which the same might reasonably be expected to let *from year to year*, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, necessary to maintain them in a state to command such rent. A particular form of making out rates is prescribed; the act is declared as not intended to prevent the usual composition for rates; and all lands and property liable to be rated may be entered upon and examined by the direction of the

(*f*) Rex *v.* The Trent and Mersey Navigation Company, 4 Barn. & C. 57.

(*g*) 6 & 7 Will. IV. c. 96.

Poor Law Commissioners, in order to ascertain the proper valuation.

This act has been amended by the Union Assessment Committee Act, 1862. It is declared (sect. 15), that the gross estimated rental shall be the rent at which the hereditaments might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any; but that the provisions in the former act for defining the net annual value shall not be repealed or interfered with.

It may be observed, in the first place, that the principle of rating enforced in this act has been always applicable to coal mines, so far as the letting is considered to be the true criterion of value. It has been distinctly decided that a coal mine must be rated at such a sum as it would let for, and not for the full annual value of the coals produced after deducting the costs of working, and that the sum must be calculated without reference to the money expended in rendering it productive (*h*).

The actual rent paid to the landlord was never considered to be a certain criterion of value (*i*). In mines it is no criterion at all. The mine may be in its infancy, or in embryo, or it may be utterly exhausted of its treasures — *crebris partubus exhausta* (*j*). The adventure may be only in a state of conception, and destined to bring forth its fruits after the exhaustion of other fields, or after the labours of many long years, or it may be a "losing concern." The rent reserved by the lease may be payable during all this profitless period. Again, the receipt of a large fine, or the prospect of great expenditure, or unusual hazard, may have induced the lessor to accept a lower rent than is usual, or the rent may have become dispro-

(*h*) Rex *v.* Attwood, 4 Barn. & C. 277.

(*i*) Rex *v.* Skingle, 7 T. R. 549; 1 Bott, 218; Rex *v.* Trustees of the Duke of Bridgewater, 9 Barn. & C. 68.

(*j*) Petrarch, Dialog. St. Aug.—The various reading "*perturbationibus*" is not less applicable to the present subject.

portionate from the ordinary course of affairs. All these circumstances show that the amount of rent is seldom, if ever, to be depended upon in calculating the amount of a rate. The tests fixed upon by decision, and confirmed by the recent statute, for determining the proper source of the rate, is to ascertain the annual value or rent which might be produced by letting the mine to other persons, with certain deductions, but without reference to the amount of money expended in bringing the mine into active operation.

Previous to the late statute, it might have been a question in what manner the letting should be supposed to be conducted. Coal mines are generally held under leases. Was the lease to be considered as assigned, and the mine to go into the possession of the assignees of the term, or was the lease supposed to be surrendered or determined, and the owners to proceed upon a new arrangement? The first mode was adopted by the Quarter Sessions in the case of Rex *v.* Lord Granville (*k*), but it was justly doubted by Mr. Justice Parke, whether that was the correct principle on which such property should be rated. The latter mode was free from difficulty if the supposed new arrangement was to continue for the period producing the amount of annual value—viz. for one year. If not, there would arise the insuperable difficulty of ascertaining what duration of interest was to be granted to the supposed lessee, a circumstance which would, of course, materially influence the amount of rent. Even before the late statute, therefore, it would seem that the valuation should be taken on the principle of annual lettings. Such a mode would not be always feasible in actual practice, because few occasions would justify the lessees in taking a coal mine for so short a period. But there is no difficulty in supposing such arrangements for the purposes of valuation: a "hypothetical tenancy" must be assumed (*l*). If this be correct,

(*k*) 9 Barn. & C. 188.

(*l*) See Reg. *v.* The West Middlesex Waterworks Company, infra.

the language of the statute is strictly consistent with previous experience; and it is now quite clear that, for ascertaining the amount of rate, all subsisting interests in the lease must be considered as at an end, and the landlord supposed to demise the mine in its actual and changing condition from year to year.

In estimating the yearly value of a coal mine, the improved annual value of the property produced by the erection of works and buildings, or by the formation of general conveniences, is also to be included. It is not the mine only that must form an element of calculation, but also all the machinery, railways, staiths, buildings, and other property of a similar nature, the acquisition of which has been considered necessary for carrying on the mining operations, and which have rendered the mine itself of much greater value and importance. Every kind of property, in short, which can be considered to form part, not only of the coal mine, but of the *colliery*, must be properly taken into account. The whole property must be considered to be demised. But in case the mine is not liable to be rated at all for want of profits, it would seem, a distinction should be drawn between that which forms strictly part of the colliery property, and that which is only acquired for the general purposes of the adventure, and is not necessarily connected with it. Thus, the occupation of land may render the adventurers liable on that account only. But if the mine is rateable in itself, it will not be necessary to observe this distinction, for the land will be rated in estimating the profits of the mine.

The rateability of mining machinery was decided by inference in the case of Rex *v.* Bilston (*m*); and it was expressly determined in another case which occurred soon afterwards. In that case, the lessee of a coal mine was rated in respect of several steam engines, and a railway, which were used for the efficient working of the mine. It

(*m*) 5 Barn. & C. 851.

was held that he was properly rated. Mr. Justice Bayley observed, if the owner had occupied the mine he would have been liable to be rated according to the improved value of the property. If it be leased to a tenant who is to incur the same expenditure of erecting an engine, the owner will receive a less royalty; but as a greater quantity of coal will be raised, the tenant will be remunerated for his expenditure, and being the occupier, he was liable to be rated for the improved value (*n*).

It will not be inquired whether the machinery be real or personal property, or liable to distress or seizure, or transmissible to heir or executor, or subject to any agreement between landlord and tenant (*o*).

But the tenant will be entitled to a fair deduction for repairing and replacing the machinery and other property; for the annual value which is designed to be the basis of the rate is part only of the annual rent. The same principle applies to houses, or any other rateable property, although in unequal proportions. In one case, it was well observed by Mr. Justice Bayley, that some portion of the rent was to be set apart to form a fund for maintaining or reproducing the subject of occupation—a much less part, if any, of the annual rent of *land* is wanted for either of those purposes, and the whole, in some cases, or nearly the whole, in others, is annual profit or value; and that in the case of collieries also, a part of the annual rent must be appropriated to repair and replace the works and engines, and in that respect they were in the same situation as houses (*p*).

In the above case, the rate was assessed upon two-thirds of the net yearly rent of several farms and lands, and upon one-half of the net rents of some houses and buildings which seem to have been unconnected with the mine,

(*n*) Rex *v.* Lord Granville, 9 Barn. & C. 188.

(*o*) Reg. *v.* Guest, 7 Ad. & E. 951.

(*p*) Rex *v.* Tomlinson, 9 Barn. & C. 163. See also Rex *v.* Lord Granville, supra.

and also of the colliery. It was held, that the sessions were in general the proper judges of value, but if the proportions had been fixed by them by an erroneous rule, the Court of King's Bench would interfere; but that in such a case the houses and collieries might be classed together, that the sessions were warranted in making a difference in the proportion of rating, and that it was impossible to say that the proportion fixed was not the right one.

The annual value of a colliery, therefore, must mainly depend upon the produce of the mine, and the cost of production with the use of the machinery and other appurtenances belonging to it. The clear annual proceeds arising from the sale of the coals must first be ascertained, after deducting all the current costs of working and management, all usual tenants' rates and taxes, the probable average cost of the repairs, insurance, and other expenses incident to the mine, the machinery, works, ways, staiths, buildings, and other property of the colliery. A deduction should also be made for interest, in the form of tenants' profits, for any capital invested in live and dead stock, or employed directly for necessary purposes. In districts where the mineral is subject to tithe, the tithe commutation rent-charge should be deducted. It may then be inquired what would be the amount of reasonable rent which a yearly tenant should pay for the whole colliery in order to secure to him a proper profit, and remuneration for his risk and undertaking, and under the assumption that the mine will continue to be worked in a regular and workmanlike manner. This amount may often depend upon intricate calculation, and must be determined by persons of competent knowledge. The condition of the mine, its prospects, its liability to accidents and interruptions, the necessity of expenditure, and other special circumstances, may all form ingredients in the calculation. The amount of this rent will be the proper source of the rate.

The following mode has been sanctioned by the Court

in the rating of gas companies, which may also be made applicable to collieries. The last account of the company was taken, to show the gross receipts and expenditure—the difference forming the net receipts for the year. From this amount were deducted: 1. A sum at the rate of twenty per cent. for tenants' profits on the capital temporarily employed for the year; 2. A sum for tenants' rates and taxes, the annual average cost of repairs, renewal and insurance of the buildings, stations, and plant, as necessary to maintain them in a state to insure the receipts; 3. A sum for renewal of all the mains. The remaining sum was taken as that for which the works might reasonably be expected to let from year to year (*q*).

Such is the mode of rating coal mines which yield such an annual profit, as might induce other persons to pay an actual rent for them. If no such rent could be obtained, the colliery will not be liable to be rated at all. It matters not how the profits are applied. They may be handed over, in part or in whole, to the landlord, or may remain with the adventurer.

In one case, the lessees lost two and a half farthings on every ton of coals; the colliery was always a losing adventure, which they must have anticipated at the time of taking it; and the inducement to work it was to enable the lessees to obtain coal of their own from other lands. But it was observed by Lord Kenyon, that there had been a clear profit of the amount of the rent, 1,000*l.* a year, since the lease was granted; that the landlord was certainly not liable; that the Court could not examine into the objection—that the lessees had made an unprofitable bargain; and, that it was sufficient to make them liable—that they were the occupiers of rateable property (*r*).

In the above case there was a clear profit of the rent payable to the lessor. If there had not been a profit,

(*q*) Reg. *v.* The Sheffield United Gas Light Company, 32 L. J., M. C. 169.

(*r*) Rex *v.* Parrott, 5 T. R. 593.

sufficient to have induced any other persons to pay rent for the mine, it has been seen, the colliery could not have been rated at all. It frequently happens, that rent is payable by persons similarly situated with respect to other mines intended to be worked, and that no part of the rent is ever realized by the adventurers. In such cases, the mine is of more value to the lessees than to any other persons; and, it is clear, they would pay a higher rent than could be procured under any ordinary circumstances. But rent is not the criterion of value. For the amount of probable rent, under the statute, must be calculated without reference to any exorbitant and fictitious value, which is given to property from the peculiar situation of the parties. It must be calculated from what might reasonably be expected to be obtained from indifferent persons willing to carry on the mine (*s*).

If the current expenditure, in general, of the mine exceed the income arising from the production of the article, no rent could be obtained, except perhaps, under extraordinary circumstances, when the prospects and condition of the mine may be peculiarly favourable for future operations. At any rate, the test will be, on all occasions, the amount for which the *whole colliery* would let, to indifferent persons, from year to year.

It has been remarked before, that it is also a frequent usage to reserve a certain annual rent, in leases of coal mines, to be payable whether the mines be worked or not, or whether any coals shall be obtained or not. When the coals are totally exhausted, and the mines cease to be worked, the subject of occupation no longer affords any annual value, and the subject matter of rating is gone (*t*). A similar principle will apply, when a mine, for which a rent is still payable, and which might be made productive, has partially or wholly ceased to be worked at the will of

(*s*) See Rex *v.* The Birmingham Gas Light Company, 1 B. & Cress. 506; 2 D. & R. 735.

(*t*) Rex *v* Bedworth, 8 East, 387; Rex *v.* Bishop of Rochester, 12 East, 358.

the lessees; for the owners of a mine are not compelled either to work it to a loss, or to make an imprudent or premature use of their property.

It has been held, that when coals are taken from under two different parishes by the same pit or shaft, and there is, in fact, but one mine, worked by the same engines and machinery, and subject to the same general management, the adventurers are to be considered as the occupiers of mines in both parishes, and should be rated accordingly (*u*).

In such cases, therefore, the following mode of valuation would appear to be required. It should be first ascertained for what amount the coal in each of the different parishes or townships, which contain no shaft for raising it to the surface, would let for, with the use of the same machinery, and under the same general mode of management, as are enjoyed at the time of assessment. A similar amount should also be estimated, with respect to the coal raised in the parish in which the pit or shaft is situated, which will, of course, include the proper proportion of the improved annual value of the whole works and machinery which are used for the whole mine, and which are presumed to be all situated in the same parish as the shaft. It should then be considered what would be a reasonable annual sum for any supposed lessee of the coal in each of the other parishes to pay for the liberty of availing himself of the common works, machinery and management for raising and vending his produce. This may easily be ascertained from the quantity of coal actually raised under the different districts. In each case, the amount of this annual sum should be deducted from the amount previously determined with respect to each district, and should be added to the like amount determined for the mine in which the pit, works and machinery are placed. The respective results will thus fix the amount

(*u*) Rex *v.* Foleshill, 2 Ad. & Ell. 593.

payable to each parish; and due allowance will have been made for the situation and advantages of the works used for the whole mine (*x*).

In some cases, the annual value of buildings and machinery might require to be ascertained with reference to the rules adopted in the rating of water and gas companies, whose operations extend over various parishes (*y*).

It may happen, however, that the coal raised in the adjoining parishes may belong to other proprietors, whose lessees may be required to pay an annual rent for the way-leave, or the liberty of bringing the coals through the lands of another proprietor. In such cases, the reasonable amount of such a rent should be estimated, and be deducted as an ordinary item of expense. If mines thus situated are worked by different lessees, and the way-leave rent is payable to any of the adventurers, the amount deducted should be added, in the manner described above. The reasons for this will appear below. But if the amount be not paid to the adventurers, of course, no addition can be made to the profits of the mine.

In like manner, if the staiths, or any part of the works, way-leaves and waggon-ways, are situate in different parishes or townships, a similar course should be pursued, and the annual value should be properly apportioned.

By the Act 17 Geo. 2, c. 37, when waste lands, which were formerly fens and marshes, are drained and improved, and the parish to which they belong cannot be ascertained, the occupier of any tenements, tithes and *mines* is to be rated to the parish that lies nearest; and, in case of dispute, the Court of Quarter Sessions, after notice to the

(*x*) Ibid.

(*y*) Reg. *v.* The West Middlesex Waterworks Comp., E. & E. 716; 28 L. J., M. C. 135; Reg. *v.* The Sheffield United Gaslight Company, supra.

parties interested, and to the parishes adjoining the lands, may cause them to be assessed as they shall think proper; and their determination is to be final.

The acts for the amendment of the poor laws in England and Wales contain several special provisions with respect to the boundaries of parishes (*z*).

It was enacted in an enclosure act, that the several allotments should be deemed to be situate within the respective townships in which the ancient lands laid; but it was provided that the act should not affect the right of the owner of the coal mines under the moor. It was held, that the first clause only affected the allotments of the commoners, and not the coal mines, which were rateable in the parish in which they were actually situated (*a*).

The soil of the shore of the sea and of navigable rivers, between high and low water-marks, belongs presumptively to the crown. It is, therefore, extra-parochial, and the mines under it will not be rateable, unless the presumption can be rebutted (*b*). The mines under the usual bed of the sea will also be exempt.

II. We may here consider the rateability of way-leaves, under which term are included the liberties often granted in the underground workings of coal, and some other mines, to enable proprietors to bring their produce to the surface through the lands or mines of others, and which, in the coal districts of the North of England, are called outstrokes.

It is a general rule, established by many cases, that no person can be rated as the occupier of a right, or any incorporeal hereditament, because these subjects are incapable, in their nature, of occupation (*c*). This has been

(*z*) 6 & 7 Will. IV. c. 7, ss. 24, 45; 7 Will. IV. & 1 Vict. c. 69, ss. 2, 3.

(*a*) Rex *v.* Pitt, 5 B. & Ad. 565.

(*b*) Trustees of Duke of Bridgewater *v.* Township of Bootle-cum-Linacre, 36 L. J., Q. B. 41.

(*c*) Rex *v.* Nicholson, 12 East, 330; Williams *v.* Jones, 12 East, 346; Rex *v.* Eyre, 12 East, 416; Rex *v.* Bell, 3 Mau. & S. 221; Rex *v.* Snowden, 4 Barn. & Ad. 713;

expressly decided with respect to way-leaves, and the same principle is applicable to all property of a similar description (*d*).

But a distinction has frequently been made in such cases, when any actual interest in the land has passed to the lessees, which may give them a right to the exclusive occupation. A licence to work mines, it has been seen, may confer such an interest. The lessees will, in such cases, be rateable as occupiers under the statute.

Thus, the Dean and Chapter of Durham granted certain leases of lands for twenty-one years, reserving the right of granting waggon ways over the demised premises, on paying damages for the spoil of ground. They then demised certain waggon ways over the lands to the appellants who constructed the ways in a manner most convenient to themselves, and prevented all other persons but those authorized by them from using them. Gates were erected by the lessees which were locked, and only opened when the waggons were travelling. Lord Kenyon said, he agreed entirely with the opinion given in the case of Rex *v.* Jolliffe, last cited; but the present case was very distinguishable. The question was, whether the defendants were possessed of property rateable to the poor, and on that point there could be no doubt. It had been contended, that, because the Dean and Chapter could only grant a way-leave, therefore nothing more than a way-leave passed to the defendants; but, he said, they were not to inquire into the titles of the occupiers (I). If a

Rex *v.* The Mersey and Irwell Navigation Company, 9 Barn. & C. 95; Rex *v.* Thomas, 9 Barn. & C. 114; Rex *v.* Undertakers of the Aire and Calder Navigation, 9 Barn. & C. 820; Rex *v.* Chelmer and Blackwater Navigation, 2 Barn. & Ad. 14, 18.

(*d*) Rex *v.* Jolliffe, 2 T. R. 90.

(I) This is not strictly true in every case. The Court must look into the nature of a licence to see what interest is conferred by it, and who are considered the true occupiers. See supra, and also 9 B. & C. 113, per Parke, J.

disseisor obtained possession of land, he was rateable as the occupier of it. Without going through the different parts of the case which show an occupation of the ground by the defendants, it was sufficient to say, generally, that they clearly appeared to be the occupiers (*e*).

A similar decision was established in the case of a barge-way which had been purchased, and used as a towing path. It was held, that this property was rateable according to the amount of the tolls (*f*). And the same principle has been uniformly applied, whenever there has been an actual and *exclusive* occupation of any land in connection with an incorporeal right (*g*).

On the other hand, if a mere right of way is granted, without any specific or exclusive interest in the land, a mere incorporeal hereditament will be created, which will be incapable of occupation. As observed by a learned Judge, no person can be an occupier unless he has the exclusive right to enjoy some portion of the soil (*h*).

But although the owners or lessees of a right of way or way-leave are not rateable, the lessors or owners of the land will undoubtedly be rateable as occupiers for the improved value which has accrued to the land from the grant and exercise of such privileges.

Similar observations apply to outstrokes. These rights indeed can hardly ever be accompanied with the grant of an actual interest in the land, because the lands or mines, over which the rights are enjoyed, are generally demised to other persons. If, however, the same persons enjoy the right and the land, they will be liable to be rated as occupiers in respect of the outstroke; for they will have an actual and exclusive interest in the land out of which the

(*e*) Rex *v.* Bell, 7 T. R. 598.

(*f*) Rex *v.* The Mayor of London, 4 T. R. 21.

(*g*) Rex *v.* Milton, 3 Barn. & Ald. 112; Rex *v.* Macdonald, 12 East, 324; Rex *v.* Brighton Gas Company, 5 Barn. & C. 466; Rex *v.* Rochdale Waterworks Company, 1 M. & S. 634; Rex *v.* Chelsea Waterworks Company, 3 Barn. & Ad. 156.

(*h*) 9 Barn. & C. 112, per Parke, J.

incorporeal right proceeds. In other cases, the owner of the land will be liable to be rated.

The principle to be adopted in rating rights of way, which run over different parishes, may easily be gathered from recent railway decisions. It is now established, after some hesitation, that the proper mode, in such cases, is to ascertain the actual rateable value of the land occupied by the railway in each parish by the ordinary rules of assessment. The rateable value of any part in any parish must be taken from the net earnings in that parish, ascertained by a comparison of the profits and outgoings arising in that parish, and not with reference to the whole railway as one concern, and by division among the parishes according to the distance traversed in each. But any expenses, *wherever arising*, which are necessary for maintaining the property in any parish at the rateable value, may be taken into account (*i*).

Section II.

MINES IN GENERAL.

I. It has long been clearly settled, that all mines, except those of coal, are exempt from liability to the poor rate; for, coal mines being expressly mentioned in the Statute of Elizabeth, it was considered to be the intention of the legislature to exclude all other mines from its operation, according to the well-known maxim of law, *expressio unius est exclusio alterius.* Later judges would have held that coal mines were only specified by way of

(*i*) Reg. *v.* The London, Brighton and South Coast Railway Company, &c., 15 Q. B. 314; 20 L. J., N. S., M. C. 124; Reg. *v.* The Great Western Railway Company, 15 Q. B. 380; 21 L. J., N. S., M. C. 84; Rex *v.* Kingswinford, 7 B. & C. 236; Rex *v.* Milton, 4 B. & Ald. 112; Rex *v.* Barnes, 1 Ibid. 113; Rex *v.* Trent and Mersey Navigation Company, 1 B. & C. 545.

example, and not of exclusion (*k*). The supposed reasons for this exemption have been adverted to in the last section. Mines in general were thought to be of too precarious and fluctuating a nature to become liable to any imposition which might discourage enterprizes of such importance to the community. Mining speculations in search of the metallic ores are always attended with more risk of failure in actual discovery than those in search of coal. This kind of disappointment can seldom, if ever, occur in a coal adventure. The coal miner may, in general, ascertain not only the existence but the quality of his article, and may often calculate, though not always, with sufficient accuracy, the cost of producing the mineral as a vendible commodity. This difference in the character of the adventures may account for the distinction presumed to have been contemplated by the legislature of Elizabeth, though it has been shown that in some districts, and in more recent times, the coal adventurer might show equal grounds for exemption. It could, however, never have been contemplated by the Statute of Elizabeth to exempt mines carried on for the production of substances which are in general both easily found and easily worked, as clay, gravel and other minerals of a similar nature (*l*). Such, however, as we shall afterwards see, is the necessary consequence of the above construction of the statute. All *mines*, therefore, of whatever substances, except coal mines, are exempt from liability to the poor rate. But it will be shortly seen, that a remarkable distinction has been drawn, in certain cases, with respect to the dues payable to the lessor of such mines.

In the first case on this subject, the adventurers were rated as the lessees of lead mines in Alston, Cumberland, and a distress had been made for the amount. On an action being brought, it was held without hesitation by

(*k*) 1 M. & S. 617; 2 Q. B. 862.
(*l*) See 2 Barn. & Ad. 73; Rex *v.* Carlyon, 3 T. R. 385.

the Court of King's Bench, that the lessees were not rateable (*m*).

In another case, the lessees of several mines of iron ore and coal were rated in one assessment. It was held that iron mines not being rateable, and as the Court had no means of ascertaining the several proportions, so as to rectify the excess of the rate, they could do nothing else than quash the order of Sessions, which had confirmed the rate generally, and which was at all events wrong (*n*).

In like manner, mines of any other mineral substances, except coal, will be equally exempt from liability. The construction of the statute having been established on the principle just mentioned, it was impossible for the Court to adopt any other rule of liability or exemption. It has, therefore, been consistently decided that mines of limestone (*o*), clay (*p*), and freestone (*q*) are exempt from liability. The absence or amount of risk and uncertainty cannot be considered.

The sole test of rateability in such cases will be, whether the article is worked by a mine. As was observed by Lord Tenterden, the Court must look to the *mode* in which the article is obtained, and not into chemical or geological character. If the commonest substances, therefore, are worked (*r*) by means of mines, there will be an exemption from all liability.

It has, however, been long held that the lessor may in certain cases be rated in respect of his dues. As the cases which involve this doctrine are not quite free from obscurity, and are not unfrequently productive of doubt

(*m*) Governor and Company for Smelting Lead *v.* Richardson, 3 Burr. 1341; 1 W. Black. 389. See Atkins *v.* Davis, Cald. 318, 325.

(*n*) Rex *v.* Cunningham, 5 East, 478.

(*o*) Rex *v.* Sedgeley, 2 Barn. & Ad. 65.

(*p*) Rex *v.* Brettell, 2 Barn. & Ad. 424.

(*q*) Rex *v.* Dunsford, 1 Ad. & Ell. 568; 4 Ney. & M. 349; 1 Har. & W. 93.

(*r*) 3 Barn. & Ad. 424. See next Section.

and litigation, it will be proper to take a concise review of the whole subject, as it stands settled by decision.

The above doctrine was first established in the case of Rowls *v.* Gell (*s*). The plaintiff was lessee under the crown of all lead mines within Wirksworth, Derbyshire, with the *lot* or *cope*. All persons have a right, by custom, to search for and work mines in the district, on the payment of lot and cope, and on conforming to the local usages established with respect to the mode of working. The *lot* is a thirteenth dish or measure of lead ore, dressed and made merchantable, and *cope* is sixpence for every load, or nine dishes of lead ore. These duties were payable to the lessee of the crown, and he was rated for their amount, which, though very variable, in that year realised the sum of 500*l*. An action of trespass was brought by the lessee against an officer of the parish who attempted to recover the rate by distress. But it was held by the Court of King's Bench, that the lessee was rateable, and that the action was not maintainable. Lord Mansfield, in delivering the judgment of the Court, admitted that lead mines were not within the statute of Elizabeth, but contended that he who received a stipulated benefit from the profit of them was not excusable; that the benefit was not a mere casual profit, but an annual revenue, if any, and very different from the casual profits of a manor, which were not annual, for there might be none for years. But if the mine produced profit to the miner, the lord's share was certain, and an annual rent was paid for it constantly. The miner was obliged to pay certain proportions to the owner of the land. But as this obligatory payment was in respect to the land, the landowner ought not to receive it clearer or neater than any other part of his estate, when he was at no trouble, expense or possible risk (I).

(*s*) Cowp. 451; 1 Doug. 304; Rex *v.* Maddern, cited 3 T. R. 480.

(1) As the *cope* in this case was the payment of a money rent, the lessee, according to the cases which profess to follow this decision, would, at any

The same point was decided in a similar case, in which the owners were rated for the fifteenth part of all the tin arising out of certain lands in St. Agnes, Cornwall, called the toll tin, and for one-twelfth part of the remainder, called the farm tin, or due. The order of Sessions, in favour of the rate, was confirmed (*t*).

These decisions were fully confirmed by a more recent case (*u*), in which the doctrine was, for the first time, founded upon any intelligible principles. The defendants were rated in respect of the lot, toll and free shares of the calamine, or *lapis calaminaris*, to which they were entitled under a lease made to them by the owner of the land. The lessees paid a yearly rent of 210*l.* for the dues, and some other property held with them. The dues were described as payable in kind, and as consisting of one-fourth in the inclosed lands. It was held by the Court of King's Bench, that the lessees of the dues were rateable. Lord Ellenborough said, if rateable at all, the lessees must be rateable for property falling under the description of land. It might be doubted whether these lessees could have maintained trespass for the calamine. There appeared, however, to be a demise of a specific portion of the produce of land, or in other words, land itself, free from risk or uncertainty. Until the stone was raised, the lord might be considered as working with the adventurers by the hands of the labourers, but, when raised, the lord's share redounded to him. That constituted land, and might fairly be construed as such within the meaning of the statute, and was therefore under

(*t*) Rex *v.* St. Agnes, 3 T. R. 480.

(*u*) Rex *v.* The Baptist Mill Company, 1 Mau. & Sel. 612.

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rate, not be liable to be rated for it. But, as has been observed by Lord Ellenborough (5 M. & S. 142), it was not necessary to mention this distinction in the above case, as it was sufficient simply to decide that the action of trespass was not maintainable, without reference to the above assessment. Mr. Justice Bayley is stated to have said in one case (5 B. & Ald. 699) that it was decided in Rowls *v.* Gell, that the party was rateable for *lot* and *cope*. This is erroneous.

that description assessable in the hands of the occupier. Mr. Justice Le Blanc observed, that the construction of the statute had excluded all mines, except coal mines, and the reason given for the distinction was, that other mines were considered as matters of hazard at that time, and that the legislature did not mean to subject the occupier of such a species of property to taxation. It remained then to be seen what construction the decisions had put on the words "occupier of lands." In determining this, the Court was not bound to follow the strict definition of land through all its consequences, and in every possible view in which it might be considered, and to decide whether trespass was maintainable. When a person receives, without risk, part of the produce extracted from the bowels of the earth, he is an occupier of land. Mr. Justice Bayley said, the soil belonged to the lord of the manor, and the persons working the mines were not tenants under him, but he had the actual occupation and possession of the land. The workers of the mines had, as a compensation for their labour and expenses, a certain part of the profits, and the owner of the soil had a share also, which was given to him, not in the character of landlord, but as his share of the immediate pernancy of the profits of the land. He considered him as having a qualified occupation, perhaps a more distinct one than the adventurers, who might be considered as servants to him, for they worked the land, to a certain extent, for his benefit, and were to pay him his share of the original produce of the land. It was not doing any violence to the lease to consider the lessees under it as occupiers of land.

In another case, the reservation was of one-eighth part of the tin and other ore to be raised within the limits of the set, the same having been first made merchantable and *fit to be smelted* and fairly divided. There was a covenant on the part of the adventurers to pay the same share in money at the election of the owner of the fee, at the market price; and it appeared that no part of the ore had ever been ren-

dered, but in lieu of it, one-eighth part of the money arising from the sale of all the ore. It was held by the Court of K. B. that the owner was rateable in respect of the dues, as the reservation was of part of the native mineral (*x*).

In another case, the render was of lead or other ore cleansed, dressed, washed, and made merchantable, and fit for the smelting mill. The mines were demised for a term of years, and not held under a licence as in the last case. It was held, that the lessor was liable to be rated for the dues as an occupier (*y*).

It is now too late to dispute the soundness of the principle established by these decisions. But Lord Kenyon might well observe, in the case of Rex *v.* Parrott (*z*), that he would form his opinion upon the question when it arose again, even after he had approved of Lord Mansfield's decision, in the case of Rex *v.* St. Agnes (*a*). It might well be urged, in the argument in Rex *v.* The Baptist Mill Company, that the cases should be reconsidered. As was observed by Lord Ellenborough (*b*), the Court had adopted a principle of refinement. It was said, the owners are rated, in such cases, not as the occupier of a mine, but of land. Let it be admitted that, before the mineral is severed from the inheritance, whether the lord may claim his share under a custom, or under the terms of an actual demise, he may be considered as the occupier of land, though incapable of recognition. But in that state it yields no profit to any one, and could not, under any circumstances, because the subject of rateability. It only assumes a value, and confers a profit, when it ceases to be land, and passes, in the form of a strictly personal chattel, into the possession of the lord. In the latter condition, the mineral, as we shall afterwards see, might subject the owner to be rated as an inhabitant for his visible property.

(*x*) Rex *v.* St. Austell, 5 Barn. & Ald. 693.

(*y*) Reg. *v.* Todd, 12 Ad. & E. 816; 10 L. J., N. S., M. C. 14.

(*z*) 5 T. R. 593.

(*a*) 3 T. R. 480.

(*b*) 5 Mau. & S. 141.

But he is never rateable as the profitable occupier of land. Such is the strict operation of law. But the mind of Lord Mansfield, so fertile in evading the strict principles of law, conceived, that as the owner received his portion without risk or expense, he must be rated for the profits of land. The duty of fortifying the decision by substantial reasons seems to have been left to succeeding Judges. The existence of risk has been shown to afford no means of determining the construction of the statute. The commonest minerals in nature are liable to be rated, if they are worked by mines. It had been decided, that such mines were not rateable under the statute, and it necessarily followed that all concerned in the adventure should partake of the exemption. The owner is described even by Lord Ellenborough and Mr. Justice Bayley as working with the adventurers by the hands of the labourers. They are all in the occupation of a mine. The reasons assigned by Lord Mansfield are most unsatisfactory. The profits of a mine were considered by him as differing from the casual profits of a manor which might produce nothing for a considerable period, and which were therefore not rateable. The case was that of a lead mine. It is unnecessary to say that the profits of the lord from the prosecution of lead mines may be equally as variable as those of a manor.

On the other hand, a landlord cannot be rated for his rent. It was said, indeed, that the delivery of the mineral was by way of exception and not of reservation, and that a rent cannot form part of the thing demised. The mineral demised is, in legal contemplation, very different from the proportion rendered. It is demised as land, but it is rendered as a chattel. The render of corn constitutes a strict legal rent subject to the remedy of distress(*c*). The corn, like the mineral, is rendered, after it has been severed from the freehold, and undergone the manual operations of the

(*c*) Co. Litt. 142 a.

labourer. Personal service alone constitutes a valid legal rent (*d*). It will be seen presently, that, if the render had been of the mineral in a smelted state, or of a money payment, the principle here contended for would have had full operation, and the landlord would not have been rated for his rent. This might well be termed by a learned Judge a subtle distinction (*e*). It might have been contended, and particularly in cases of licence, that the lord would still be liable even in a case of money payment; for it has been observed by Lord Kenyon, that the exemption of quit rents went upon the objection of double rating the same property in the hands of both the landlord and tenant (*f*). Such an objection could not be urged in the present instance. It must be admitted, the whole distinction is exceedingly slight. Under all conditions, the adventurers pay a certain consideration for the right of mining to the lord, who, in return, permits the trial and partial exhaustion of his estate. This consideration is, in point of fact, a rent.

Since the above remarks were written, the rateability of toll tin, rendered in kind by custom, was lately brought before a Court of Error. It was urged, that the render under a custom could not constitute occupancy. But the Court, per Tindal, C. J., held, that the subject was concluded by the decisions, that the rules with respect to rating materially affect the value of estates, and it was in no cases more important to abide by previous decisions. But it was intimated, that, if the subject were new, it would be very questionable whether the occupier of mines of any kind was exempt (*g*).

It would appear to make no difference in the rateability

(*d*) Ibid.; Lanyon *v.* Carne, 2 Saund. 165.

(*e*) 4 Barn. & Ad. 169, per Taunton, J.

(*f*) 1 East, 534.

(*g*) Crease *v.* Sawle, 2 Q. B. 862; 11 L. J., N. S., M. C. 62.

of the landlord, if the mine is worked under an exclusive licence, with a similar reservation. If he is liable in respect of his proportion when he is only considered to be in the possession of that part, *à fortiori* he must be liable when he is in possession of the whole unsevered mineral (*h*).

It might certainly be contended, that the grantees of a licence only acquire a liberty of working mines, and that the grantor still remains in the possession of the mine, and should be exempt as the occupier of unrateable property. This objection seems to have been entertained by Mr. J. Parke, in a similar case. But the expression was afterwards qualified by him, and such an exemption considered not to extend to *dues* (*i*). The grantor may, in legal contemplation, be the occupier of a mine, and may still be liable to be rated for the mineral reserved to him. His occupation is qualified only, and is distinct from the special occupation he is considered to retain in his particular portion. He is still the occupier of land yielding a certain revenue, though, as in the case of a demise, the land which is finally to be allotted to him as his share of the profits cannot be identified, any more than the land which is to produce the money rent (*j*). But the point is expressly settled by the case of Rex *v.* St. Austell.

We may now notice the cases which are exempt from the application of the principle we are now discussing.

It has been clearly decided that if a yearly rent, payable in money, be reserved upon a lease of mines, the lessor will not be rateable, because he cannot be considered to be the occupier of any part of the land.

A lease was granted in 1805, by the trustees of Lord Crewe, of several mines of lead ore, and other minerals, with a reservation of the rent of 100*l.* There was also

(*h*) Rex *v.* St. Austell, 5 Barn. & Ald. 700.

(*i*) Rex *v.* Tremayne, 4 Barn. & Ad. 162. This case was decided on other grounds. See infra.

(*j*) See Rex *v.* Tremayne, supra, arguendo.

reserved the usual proportion of lead ore which should be obtained; but as no lead ore had been raised, no question arose upon that subject. A rate was assessed on the trustees. There was cited, in the argument, a resolution of the Judges of Assize in 1632, in answer to the question whether shops, salt pits and profits of a market were taxable to the poor, to the effect that all things which were real and in yearly revenue must be taxed to the poor (*k*), and it was contended, that rents were only not taxable when the whole profit of the land was already taxed in the name of the tenant (*l*). But it was held, that the trustees were not rateable as not being occupiers of the property, and that, if they were rateable, every landlord might, by the same rule, be rated for his rent (*m*).

In another case, several leases of mines of lead, and other minerals, had been granted to mining adventurers at yearly money rents, amounting to 2,600*l.* for one part of the term, and 2,400*l.* for the remainder. The trustees, under the will of one of the owners of the fee, were rated for an annual rent of 2,000*l.*, paid by the lessees, in respect of their proportion of the property, namely, two-thirds, and also in respect of their being occupiers of the moors and wastes of the manor. The rate was confirmed by the Sessions, but it was held by the Court of King's Bench, that the rent was clearly not the subject of rate, and that the rate was bad on the single ground, that it was a conjoint rate in respect of two things, one of which was not rateable (*n*).

If the amount of rent correspond with the quantity of mineral raised, there will still be no liability in respect of the rent.

Several mines of manganese were worked by certain ad-

(*k*) Dalt. Just. ch. 73, p. 235.

(*l*) Lord Bute *v.* Grindall, 2 H. Bl. 265; Eckersall *v.* Briggs, 4 T. R. 6; Atkins *v.* Davis, Cald. 315; Holford *v.* Copeland, 3 Bos. & Pul. 129.

(*m*) Rex *v.* Bishop of Rochester, 12 East, 353.

(*n*) Rex *v.* Welbank, 4 Mau. & S. 222.

venturers, on payment of the sum of 1*l.* 15*s.* for every ton weight of the mineral raised during the term to the owner of the lands in which the mines were situate. The latter was rated for "manganese dues," and the Court of Sessions confirmed the rate. But it was held in the Court above, that the rate could not be supported, on the ground that the lord was not the occupier of the soil, but only received a money rent (*o*).

In another case, the appellant was the lessee under the Duchy of Cornwall of the toll tin, which is a render in kind. The mine was within the tin bounds, subject to the custom of the Stannaries, by which the right of working is vested in the owner of the bounds, subject to the customary toll. The appellant granted by deed a licence to work the mine, subject to a money payment. He had, in strictness, only power to grant the toll tin, but he assumed power over the mine. It was urged, that at any rate all his interest in the toll tin passed, in consideration of a rent, which had been always paid in money. On the other hand, it was contended that the licence was colourable, and designed to avoid the rate. But it was held by the Court of Queen's Bench, that it was not its province to infer fraud, when none was found by the Sessions, and that the appellant was not rateable (*p*).

We now come to another distinction, in a subject on which so much refinement has been displayed. It has been held, that when the reservation is not of part of the mineral in its natural state, but after it has undergone some species of manufacture, as, for instance, the process of smelting, the lessor will be exempt from liability in respect of this reservation in the same manner as if it had been a money rent. The reasons for this decision will appear from the judgment of Lord Ellenborough, cited below. It may be premised, however, that the reader

(*o*) Rex *v.* Tremayne, 4 Barn. & Ad. 162. See also Rex *v.* The Baptist Mill Company, 1 Mau. & S. 612, per Le Blanc, J.

(*p*) Reg. *v.* Crease, 11 Ad. & E. 677; 9 L. J., N. S., M. C. 38.

should be careful not to confound the process of washing and cleansing the ore with that of preparing it for the market in a manufactured condition available for the general purposes of trade. This distinction has been already pointed out. When the reservation is of ore dressed, washed and made merchantable, it is still a reservation of the mineral in its natural state; and the preliminary process consists only in effectually separating it from the soil and other foreign substances, and does not in any manner change the inherent quality of the article. It is still, therefore, in this state, an identified portion of the land. This was the reservation in the cases of Rowls *v.* Gell, Rex *v.* St. Agnes, and Rex *v.* The Baptist Mill Company (*q*), and the lord was, in these cases, held to be rateable.

But, in the case of Rex *v.* The Earl of Pomfret (*r*), the reservation was to consist of one-fifth part of the best ore hearth *lead*, and of all the slag, or slag hearth *lead*, *that should be smelted* from the ore to be raised in the mines; and there was a covenant on the part of the lessees to deliver the fifth part as often as the quantity smelted should amount to four hundred pieces, or at the end of every four weeks, at the option of the lessors. The rate was imposed upon the latter, in respect of the duty lead. Lord Ellenborough, in delivering the judgment of the Court, observed, this was not a reservation of any part of the thing demised, nor of the mineral in its natural and primitive state, but of something of a quality, name and character entirely different, of a metal produced from that mineral by the laborious and expensive process of smelting, in which the native mineral was mixed with another matter, viz., with coal or charcoal; and, by the effect of fire upon both, a metal is obtained, which is to be considered, for this purpose, at least, as entirely different from either of the two, and rather as a manufacture of art and

(*q*) See supra.

(*r*) 5 Mau. & Sel. 139.

labour resulting from the use and application of these materials. The lease put the parties unequivocally in the character of landlords and tenants.

It has been seen that in other cases the reservation was of ore *fit to be smelted*, and that it did not fall, therefore, within the operation of the preceding principle.

The result, therefore, seems to be this—that all mines, except coal mines, are exempt from rateability, whether they are worked by lessees or the proprietor of the soil; that when they are worked either under a lease, or under a licence, or in compliance with local custom, the landlord is rateable for his rent, if the render is of a proportion of the mineral in its natural condition, as an occupier of land; and even if under the deed, or by subsequent agreement, he elects to take a money payment; but that he is, in no instance, liable to be rated as an occupier, if the reservation is of part of the mineral in a smelted or manufactured state, or of a rent payable in money.

II. Mines, in general, being thus exempt from rateability, it will follow that all the engines, railways, machinery, buildings and other property of a similar nature, necessary or proper for the effectual working of mines, and whether employed beneath the surface or upon the surface, are equally exempt; for they form, in point of fact, a property inseparable from the enjoyment of the mines themselves (*s*). It may be laid down as a general rule, that all the mining apparatus, which would have been liable to be rated if the mine were a coal mine, will be exempt in the case of other mines (*t*).

But there is a broad line of distinction to be drawn in defining the limits of rateability in other respects. When the ore or material has been washed and effectually separated from its native bed, and made merchantable, the

(*s*) Rex *v.* Bilston, 5 Barn. & C. 851.

(*t*) See Sect. 1.

operation of mining is then complete. The mineral is ready for a process of manufacture, and the property employed for all subsequent operations will be liable to be rated in the same manner as for any other description of property used in the arts. All smelting mills, therefore, furnaces and all the machinery, buildings and conveniences attached to them, will be rateable. This rate, however, must be assessed without reference either to the profits of the mine or of the business, but according to the fair annual value of the property, if it were to be let from year to year to indifferent persons for the purpose of carrying on the business, or assessed upon such a rent as the manufacturers would pay if the property was not their own. It is clearly established that no rate can be assessed upon the profits of trade (*u*).

It frequently happens that a reservation of mineral is stipulated to be made free from all rates and deductions. It is hardly necessary to say that such agreements will only be available as between the parties themselves; and that the rate must be assessed upon the party legally liable to it. Of course, if a lessee under such circumstances refused to pay the rate, it would amount to a breach of covenant.

III. Such is the law with respect to the rateability of persons in the *occupation* of mines, and of the lessor as an occupier of land. It may now be inquired in what cases the produce of a mine may be rated in respect of inhabitancy.

By the statute of Elizabeth, the rate is also to be assessed by taxation of every *inhabitant*, parson, vicar and others, as well as of every occupier.

It has been generally considered, that the words "inhabitant, parson, vicar and others," include all those who possess property not coming within the several species of it

(*u*) Rex *v.* The Birmingham Gas Light Company, 1 Barn. & C. 506; 2 D. & R. 735.

described in the following part of the same clause, viz., the clause with respect to occupation (*x*). Thus, coal mines are rateable under the latter clause, and by its construction all other mines have been held to be entirely exempt. No question, therefore, of inhabitancy can arise with respect to these. We have seen, however, that a lessor or owner may receive a render of—first, a portion of the mineral in its natural state; secondly, a part of the mineral in its manufactured state; or, thirdly, a money payment. Now, it has been shown that, by the first mode, he will be rateable under the latter part of the clause as an occupier of land, and that by the two latter modes, he is not rateable as an occupier. It has never been expressly determined that he would be rateable as an inhabitant for the second mode; but there does not appear to be any reason for supposing that he would not. Inhabitants are rateable in respect of their visible personal property in the parish. When the mineral is delivered to the lessor in a manufactured condition, it constitutes property of that description, and is rateable accordingly. It might be objected, indeed, that it is a rent, and that the rating of it would infringe upon the general principle that a landlord cannot be rated for his rent. But this principle, it has been seen, was incapable of protecting him in the question of occupancy. The rating of an ordinary rent would be a double taxation; in this instance, it would not. The mineral may be considered to be rateable without reference to its being a rent, but merely as visible property. When by the third mode the reservation is of a money rent, there will not be such a description of property as to render the lessor liable as an inhabitant.

It has been asserted, in a book of very general reference (*y*), that it was held, in the case of Nightingale *v.*

(*x*) Burn's Just. Chitty's Ed. 4, 109; Rex *v.* The Inhabitants of North Curry, 4 Barn. & C. 953; 7 D. & R. 424.

(*y*) Burn's Just. Poor, 133; Chitty's Ed.

Marshall (*z*), to be a valid custom, to rate all persons in a parish according to their apparent ability, without regard to the visible property in their possession. This is quite erroneous. The point in that case was confined altogether to the right of voting at vestry meetings, under the 58 Geo. III. c. 69, s. 3; and it was expressly declared by Lord Tenterden, that he gave no opinion as to the validity of the rates.

Much importance has occasionally been attached to the growth of custom in rating property; and the practice seems to have been expressly countenanced in one case by Lord Mansfield. But, it is submitted, the law upon this subject was much more correctly stated by Mr. Justice Aston on the same occasion, who observed, that, if upon the general question it should turn out to be the law that personal property is rateable, it must then be rated, though it was never rated before (*a*). It cannot, surely, in any case, be contended that custom can control an express act of parliament.

But it must be observed, that every rateable inhabitant must be actually resident within the parish in which he is rated; and that a resident partner will not render a non-resident partner liable for his share (*b*). A residence will only be constituted where the person eats, drinks and sleeps, or where his family, or his servants, eat, drink and sleep (*c*).

IV. The statute of Elizabeth applies to the whole kingdom of England and Wales. But it frequently happens, that, in providing for the particular exigencies of a district or town, a different system of rating is permitted by a special act of parliament. One rule of construction applicable to these local acts is thus expressed by Lord

(*z*) 2 Barn. & C. 313.

(*a*) Rex *v.* The Overseers of Andover, Cowp. 550.

(*b*) Rex *v.* Gosse, 7 Barn. & C. 60; 9 D. & R. 759.

(*c*) Rex *v.* Nicholson, 12 East, 342, per Le Blanc, J.; Rex *v.* The Inhabitants of North Curry, 4 Barn. & C. 953; 7 D. & R. 424.

Tenterden:—"When we find a deviation from the language in the statute of Elizabeth, the presumption is, that the deviation was intended, and that a different system was thought better" (*d*).

When mines or quarries are subject to tithes, either by a local act of parliament, or by local custom, the tithe, if payable in kind, will be rateable to the poor, even if it afterwards be commuted for a money payment, by the voluntary act of the parties, or under the Tithe Commutation Act (*e*). But an act of parliament may, of course, either direct the tithe to be free from all rates, or may impose them upon the tithe-payer. It may be doubted whether an ancient money composition for tithes is generally rateable in such cases.

Section III.

QUARRIES.

The construction of the statute of Elizabeth does not exempt *minerals*, but only *mines*, from liability to the poor rate. It follows, therefore, that, if minerals are obtained in any other manner, the lessee or owner will be liable as an occupier of land. The rarest and most valuable metals and minerals may thus be rated in the same manner as the commonest mineral substances, as limestone (*f*), slate (*g*) and clay (*h*) (I).

(*d*) Rex *v.* Hull Dock Company, 3 Barn. & C. 516.
(*e*) 6 & 7 Will. IV. c. 71, s. 69.
(*f*) Rex *v.* Alberbury, 1 East, 534.
(*g*) Rex *v.* Woodland, 2 East, 16.
(*h*) Rex *v.* Brown, 8 East, 528.

(I) In the lead districts of the North of England, and in other localities, it was formerly a common practice to attempt the discovery and working of metalliferous veins by accumulating a quantity of water at the surface, and then suddenly causing it to discharge itself. This operation, technically called "hushing" in the North, carries off the surface soil, and not only dis-

The difference between a mine and a quarry must, in general, be sufficiently obvious. But difficulties may sometimes arise in proportioning the amount of rate, when the produce is obtained by both means. All such questions are for the consideration of the Court of Quarter Sessions; and the Court of Queen's Bench will always return a case to the Sessions, if it be not sufficiently expressed whether the place in question is a mine or a quarry; and, if the point is doubtful, it is not sufficient for the case to describe the works, and leave the conclusion to the Court above. The Sessions must find the fact—not furnish the evidence (*i*).

In one case, a rate was assessed upon the Earl of Dudley, as the owner and occupier of limestone works. The strata were stated to crop out or terminate frequently at the surface, and to deepen in the opposite direction. Several workings had been effected by daylight or open work, and afterwards the continuing strata were worked at from forty to fifty yards below the surface, by pit shafts, steam-engines and other apparatus suitable for working coal, ironstone and other minerals. The produce was wholly drawn up the pit shafts, or sent off by an underground level. The working required experience, and was carried on by persons brought up to the occupation, called limestone miners. It was held by the Court of K. B., that the property was not rateable. Lord Tenterden remarked, that the description of the manner in which the stone was obtained corresponded with the usual mode of mining. The existence of metal was not necessary to constitute a mine. To deny the character of a mine to the works in

(*i*) Rex *v.* Dunsford, 1 Ad. & Ell. 568; 4 Nev. & M. 349.

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covers the character of the veins, but often exposes a quantity of ore, which may be worked "from the day." There can be no doubt that the produce acquired in this manner is rateable; but the mode is now seldom resorted to, and is usually prohibited in mining leases.

question, would be to depart from the ordinary and proper meaning of that word in the English language (*k*).

In another case, it was found, by the Sessions, that a perpendicular shaft had been sunk from the surface for the purpose of raising clay out of the strata; and that this was effected by a steam-engine, and other mining apparatus; that the excavations were like those which were made for working coal and metallic mines; and that the mode of raising the clay was the same as that used in a coal mine. It was held, that the property was not rateable (*l*).

In the case of Rex *v.* Dunsford, the appellant was described as the occupier of a freestone quarry, but the case did not negative the idea of the place being a mine. The place was described as not open like a pit, but as approached by a waggon-way, three hundred yards in length and communicating with an inclined plane at the mouth of the quarry, which was entered by a level. One of the excavations, pursuing the course of the layers of the stone, was ninety-seven yards under the ground. The works were carried on by candlelight only. Skill and judgment were required for the excavation, and for properly supporting the roof. There were no air passages or tunnels. The case was sent back to the Sessions to ascertain the fact of the place being a mine or a quarry. The quantity of subterraneous works created the difficulty. The case was reheard at the Sessions, and the place was found to be a mine (*m*).

It has been seen, that the word "mine" should be interpreted according to its ordinary meaning in the language. Other operations and facilities for raising the minerals are not to be confounded with the process of mining; steam-engines, air gates and other machinery do not constitute a mine. The fact of the existence of a mine must depend

(*k*) Rex *v.* Sedgeley, 2 Barn. & Ad. 65.

(*l*) Rex *v.* Brettell, 3 Barn. & Ad. 424.

(*m*) 1 Ad. & Ell. 574.

upon the nature of the place where the mineral is severed from the land. If the place of operation be fully, or even partially, exposed to the light of day, it must be considered a quarry. If, on the other hand, it is only approachable by means of a horizontal level, or any excavation of a similar character, and the works are necessarily carried on by subterraneous workings, for which the light of day is insufficient, the place must be considered, to all intents and purposes, a mine. It is essential to the description of a mine, that the works are carried on beneath the surface of the earth, and secluded from the light of day.

The observations already made with respect to the mode of rating coal mines, and property held with them, will, in general, apply equally to quarries (*n*). It has been seen, that the grantee of a licence to work quarries, which does not operate to confer an exclusive interest, is not liable to be rated (*o*).

The rateable value of a brick field, in any year, may be ascertained with reference to the royalty payable for the bricks, as well as the rent, but without respect to the exhaustion of the material, or to casualties of manufacture; but the true test is still, under the Parochial Assessment Act, the probable rent for which the field might be let from year to year for its present purpose (*p*).

Section IV.

THE IRISH ACT.

By the Act for the Relief of the Poor in Ireland (*q*), "all opened mines," "profits to be taken out of any land," "rights of way and other *rights or easements* over land," are declared to be rateable hereditaments. But it is

(*n*) See sect. 1.

(*o*) Rex *v.* Trent and Mersey Navigation Company, 4 Barn. & C. 57.

(*p*) Reg. *v.* Westbrook, 10 Q. B. 178; 16 L. J., N. S., M. C. 87.

(*q*) 1 & 2 Vict. c. 56, s. 63.

provided, that no mines which have not been opened seven years before the passing of the act shall be rateable, until the term of seven years from the time of the opening thereof shall have expired; and no mines hereafter to be opened shall be rateable, until seven years after the same shall have been opened; and mines *bonâ fide* re-opened, after the same shall have been *bonâ fide* abandoned, shall be deemed an opening of mines, within the meaning of the act.

By this enactment, therefore, all quarries and all mines, of whatever description, which have been opened for seven years, are equally rateable for the relief of the Irish poor. With respect to the re-opening of mines after they have been abandoned, it may be observed, that the *bonâ fide* abandonment of a mine by one company, and its immediate prosecution by another, can scarcely be held sufficient to constitute an opening within the meaning of the act, so as to require the lapse of a period of seven years, before it is liable to be rated. The clause must be construed with reference to the mine, and not to the persons.

We have seen, that, in England or Wales, a way-leave, or right of way, is not a rateable hereditament in itself, but that it may be indirectly rated by assessing the land over which it is enjoyed for the improved value it has acquired. By the Irish Act, these rights may be directly rated in themselves.

When a mine or quarry is worked under a licence, the question raised with respect to English coal mines and quarries, in cases where there is no exclusive occupation, will be effectually precluded (*r*). The adventurers will be equally liable, whether claiming under a licence or an actual demise.

The same principle of valuation is adopted in this act as in that for regulating parochial assessments in England and Wales. Every rate must be a poundage rate, made

(*r*) See sect. 1.

upon an estimate of the net annual value, viz. of the rent at which, one year with another, the same might, in their actual state, be reasonably expected to be let from year to year; the probable annual average cost of the repairs, insurance and other expenses, if any, necessary to maintain the hereditaments in their actual state; and all rates, taxes and public charges, if any, except tithes, being paid by the tenant (*s*). Similar powers, to enter and examine the property, are given to the commissioners, and other persons appointed by the guardians in order to revise and correct any existing survey or valuation.

Part II.

I. *The County Rate*
II. *The Highway Rate.*
III. *The Church Rate.*

I. By the statute 55 Geo. III. c. 51, the same property which is rateable to the relief of the poor is liable to the county rate, and the Court of Quarter Sessions is empowered to direct a fair and equal county rate to be made for all the purposes to which the county stock is or may be liable, and to assess every parish and township rateably and equally according to a certain pound rate of the full and fair annual value of the property.

The churchwardens and overseers may be required to make returns of the annual value, without regard to the actual amount assessed on the property, except in places where the property is assessed to the full and fair estimated annual productive value (*t*). But since the operation of the act for regulating parochial assessments, the basis and mode of valuation will be the same, both as to poor rates

(*s*) 1 & 2 Vict. c. 56, s. 64. (*t*) Sect. 2.

and county rates. The Court of Quarter Sessions may also require the production of the parochial assessments (*u*).

The payment of the rate to the county treasurer is to be made by the overseers of the poor in the same manner as before; and they are empowered to raise the amount by an equal rate or assessment upon all the rateable property, to be paid by the occupier (*x*). Special provision is made for places where there is no poor rate, or overseer or churchwarden (*y*), and for places where the poor rate is not solely and separately applied within their particular limits (*z*). By the explanatory act of 56 Geo. III. c. 49, extra-parochial places and other places which are not considered to be rateable to the relief of the poor are to be rated to the county rate.

II. The highway rates are now regulated by the statute of 5 & 6 Will. IV. c. 50. The old statute duty, and the means for obtaining funds by way of composition, are now abolished; and a rate is directed to be made, assessed and levied by the surveyor upon all property now liable to be rated to the relief of the poor. But it is expressly provided that the rate shall also extend to such woods, *mines* and *quarries of stone*, or other hereditaments as have heretofore been *usually* rated to the highways (*a*). It has been seen that *all* quarries are rateable to the relief of the poor, and, therefore, in the absence of other grounds of exemption, they need not have been expressly mentioned. But with respect to those mines and other hereditaments which are not liable to be rated for the poor, it will only be requisite to show that they have been *usually* rated to the highway rate, to make them still liable under the recent statute. The surveyor may inspect the poor-rate books at

(*u*) 1 & 2 Vict. c. 56, s. 9.
(*x*) Sect. 12.
(*y*) Sect. 8.
(*z*) Sect. 13.
(*a*) Sect. 27.

a reasonable time and place (*b*); and the rate must be made upon the occupier (*c*).

It has been held, that the mines "usually rated to the highways" need not be the identical mines which have been rated, but that the clause includes all new mines of the same class and kind as those usually rated in the parish before the passing of the act (*d*).

III. With respect to church rates, all mines and minerals appear to be rateable, under the description of land (*e*).

(*b*) 1 & 2 Vict. c. 56, s. 28.

(*c*) Sect. 29.

(*d*) Reg. *v.* Saunders, 3 Ell. & B. 763; 24 L. J., N. S., M. C. 57. See Reg. *v.* Rose, 6 Q. B. 153; 13 L. J., N. S., M. C. 155.

(*e*) See God. Append. 10, 11.

CHAPTER XIII.

THE REMEDIES RELATING TO MINES AND MINERALS.

I. *Legal Remedies.*
II. *Equitable Remedies.*
III. *Working out of Bounds.*
IV. *Criminal Offences.*
V. *Disputes with Workmen and Agents.*

Section I.

LEGAL REMEDIES.

The subject of remedies connected with mining property has been already incidentally discussed in various parts of the treatise. Much, therefore, which might otherwise have been found under the present title, has been anticipated. It will be proper, however, to lay before the reader a general view of the subject, which may include the discussion of those remedies which have not yet been particularly mentioned.

It has been seen that a property may be acquired in mines which will be quite independent of the property in the lands in which they are situate. In this condition, the minerals, of whatever character they may be, will of course still form parts of the land itself, and will constitute land in strictly legal acceptation. As such, mines become liable to the administration of all the usual remedies relating to the law of real property, except in those cases which, in consequence of the peculiarity of this species of

property, may necessarily demand some modification of those remedies (*a*).

It may be proper again to remind the reader that the word mine is not here used in its strict sense, but as descriptive of the strata or minerals themselves.

An action of trespass may be maintained in respect of any improper interference with the enjoyment of mines in all those cases in which that remedy is generally applicable. The same kind of action is usually resorted to for trying the validity of a title (*b*).

At common law, an action of waste was maintainable to recover the place wasted, as well as damages for the injury done to the inheritance. This form of action, however, was attended with many difficulties and peculiarities, and gradually fell into disuse. It is now expressly abolished (*c*). The modern remedies for punishing the commission of waste are an action on the case in the nature of waste, an action of covenant, and an action of assumpsit. The two latter actions are almost confined to cases between landlord and tenant. The action of assumpsit is resorted to when the tenancy is by agreement, not under seal, or in cases of an *implied* covenant. The action of covenant arises upon express and legal covenants. But an action on the case is most generally applicable in cases of waste, and is maintainable by the reversioner or remainder-man for life or years, against a stranger or tenant, even if the latter be a tenant at will or by sufferance (*d*). It may be brought against a tenant after the expiration of his term (*e*).

An action of trespass is also maintainable in cases of waste (*f*).

(*a*) Crocker *v.* Fothergill, 2 B. & Ald. 652.

(*b*) Bourne *v.* Taylor, 10 East, 189; Roberts *v.* Davey, 4 B. & Ad. 665; Lord Feversham *v.* Emerson, 24 L. J., N. S., Exch. 254.

(*c*) 3 & 4 Will. IV. c. 27, s. 36.

(*d*) 2 Wms. Saund. 252, n. 7; West *v.* Treude, Cro. Car. 187; Sir W. Jones, 224.

(*e*) Kinlyside *v.* Thornton, W. Bl. Rep. 1111.

(*f*) West *v.* Treude, supra.

The remedies with respect to waste committed by ecclesiastical persons have already been discussed (*g*).

The lessor of a mine may maintain an action of trespass on the case against his lessee for an injury to his reversion, for an improper working of the mine, although the injury might have been redressed by an action for breach of covenant under the lease. When there is a contract under seal, the same contract, not under seal, cannot be the ground of an action. But when a lessee commits an act of waste, the lessor is not bound to take the higher remedy for breach of covenant (*h*).

There may sometimes be an election between case and trespass. If workmen are forcibly ejected from a mine, it is trespass; but the refusal generally to allow a claimant to exercise his rights, which may exist in parts of the mines not previously worked, would furnish sufficient ground for an action on the case (*i*).

In an action for damages suffered by an owner in his coal mine, in consequence of the working of another owner in his mine, which was separated from the former by another coal mine, it was held, that an action on the case was the proper remedy (*k*).

The grant of an exclusive licence will support an action of trespass or of case (*l*).

Under such a licence it is not necessary, in an action on the case, to show a seisin in fee, as that action is founded on possession only (*m*).

(*g*) See Chap. IV. See also Herring *v.* Dean and Chapter of St. Paul, 3 Swanst. 510, per Sir Thomas Plumer; Bishop of Winchester *v.* Wolgar, cited ibid. 493.

(*h*) Kinlyside *v.* Thornton, 2 W. Bl. 1111; Muskett *v.* Hill, 5 Bing. N. C. 694; Marker *v.* Kenrick, 13 C. B. 188; 22 L. J., N. S., C. P. 129. See M'Donnell *v.* M'Kinty, 10 Irish L. Rep. 514.

(*i*) Muskett *v.* Hill, supra.

(*k*) Haward *v.* Bankes, 2 Burr. 1113. See Raine *v.* Alderson, 6 Scott, 691; 4 Bing. N. C. 702; Scott *v.* Shepherd, 2 Bl. 392, and 1 Smith's Leading Cases, 210, as to the distinction between trespass and case.

(*l*) Bishop of Winchester *v.* Knight, 1 P. W. 407; Harker *v.* Birkbeck, 1 W. Bl. 482; 3 Burr. 1556; Roberts *v.* Davey, 4 B. & A. 665.

(*m*) Thriscutt *v.* Martin, 3 Exch. 454; 18 L. J., N. S., Exch. 291.

An action of ejectment will also be maintainable for recovering the possession of a mine. It might certainly be contended, when mines form a distinct inheritance, that the action of ejectment is possessory; that the object of contention must, at least, be such as to be capable of actual possession from the delivery of the sheriff; that all the excavated parts would be of an incorporeal nature, or, at any rate, would become part of the general freehold, through which a mere right of way would be permissible; and that all the portions, which are severed, instantly lose the character of land, and become mere personal chattels. Such an action would certainly not seem to correspond, in such a case, with its exact definition. But in this, as in some other instances, the action of ejectment has been carried beyond its original limits. It has been expressly decided, that such an action for the recovery of mines may be supported (*n*).

It would seem, however, to be doubtful whether such an action could be brought to recover the possession of unopened mines, the title to which is distinct from that to the surface. This subject has been already discussed in considering the operation of a feoffment with livery of seisin. In a case of unopened mines, it was observed by Lord Hardwicke, that the question was not, whether actual entry was necessary, and he denied that without entry an action of ejectment could not be brought; for the common rule, obliging the defendant to confess lease, entry and ouster, was, in law, sufficient to support that (*o*).

It will be seen, in a subsequent chapter, that the action may be brought for tin bounds, when they are preserved by

(*n*) Comyn *v.* Kyneto, Cro. Jac. 150; Wyld's case, Lawson *v.* Williams, cited Cro. Jac. 150; Cullen *v.* Rich, Bull. N. P. 102; Harebottle *v.* Placock, Cro. Jac. 21; Andrews *v.* Whittingham, Carth. 277; 1 Salk. 255.

(*o*) Sayer *v.* Pierce, 1 Ves. sen. 232. See Chap. VI., and Wilkinson *v.* Proud, 11 M. & W. 33; 12 L. J., N. S., Exch. 227.

the actual working of the mines, and not merely claimed by cutting turves.

Although an ejectment will not lie for a bare incorporeal hereditament, yet all the rights and easements of that kind enjoyed with land or mines may be recovered with the subject matter of which they are deemed to form part (*p*).

On the trial of an ejectment, the mesne profits may now be recovered down to the time of verdict (*q*).

It has been seen, that an ejectment cannot be brought by the lord of a manor for the mines situate in the lands of his copyhold tenant, in the absence of special custom; for though the former is entitled to the right of property, the latter is entitled to the right of possession (*r*).

It has been decided, that such an action will not properly lie in respect of a licence only to work mines. In the case of a licence, an action of this kind was brought for the recovery of the mines. It was held by the Court of King's Bench, that a proviso for re-entry was not less applicable to a licence to work mines, than to an actual demise of the minerals, because under such a licence works might be effected, and a corporeal possession had, which it might be competent for the grantor to reserve, but that such an instrument did not confer a right sufficient to support the action of ejectment (*s*).

When the minerals are severed, and become the subject of manipulation, they are mere personal chattels, like the trees which are severed from the freehold, and an action of trover will, therefore, be maintainable for their recovery in that condition. This form of action has been often adopted to try the right to mines (*t*). A parol licence is sufficient

(*p*) Crocker *v.* Fothergill, 2 B. & Ald. 661, per Holroyd.

(*q*) 1 Geo. 4, c. 87, s. 2.

(*r*) Lewis *v.* Branthwaite, 2 Barn. & Ad. 437. See Chap. II.

(*s*) Doe *d.* Hanley *v.* Wood, 2 Barn. & Ald. 739, 740.

(*t*) Wilson *v.* Mackreth, Burr. 1825; Hoe *v.* Taylor, Moore, 355; Player *v.* Roberts, W. Jones, 243;

for this action (*u*), and it need not be exclusive, with respect to the minerals actually raised.

The change of chalk into lime, it seems, may be sufficient to defeat the action (*x*).

The ejectment of workmen, and the refusal to allow the removal of the property, do not amount to sufficient evidence of conversion, in the legal sense (*y*).

An action of trover cannot be maintained for the recovery of a certificate or voucher of a person being entitled to certain shares in a mining association, if the plaintiff can show no *legal* title to the document (*z*).

An action for use and occupation was held to be maintainable, in respect of a shaft or down, which had been let by a written agreement not under seal, if the defendant could be considered as having taken possession of the shaft; and he was also held liable, under those circumstances, to all the rent payable to the lessor till the determination of his tenancy, and whether he had continued to work the mine or not. But it was also said, that if he had merely caused holes to be dug, and had them filled up immediately, with a view to ascertain only what kind of a bargain he was about to make or had made, such acts would not amount to a taking of possession (*a*).

A non-resident partner in a cost-book mine is not within the jurisdiction of the County Courts Act, as a person carrying on business there (*b*).

Mines may also be taken possession of under the writ of elegit. A tenant in elegit, it has been seen, cannot open mines in lands of which he has taken possession. This restriction, it is presumed, would not apply to mines forming

Cullen (Lord) *v.* Rich, Bull. N. P. 102; 2 Str. 1142; Rowe *v.* Brenton, 8 Barn. & C. 737; Rowe *v.* Grenfell, R. & M. 396.

(*u*) Northam *v.* Bowden, 24 L. J., Exch. 237; 11 Exch. Rep. 70.

(*x*) Thorogood *v.* Robinson, 14 L. J., N. S., Q. B. 87.

(*y*) Ibid.

(*z*) Dawson *v.* Rishworth, 1 Barn. & Ad. 574.

(*a*) Jones *v.* Reynolds, 7 Carr. & P. 335; 4 Ad. & E. 805.

(*b*) Mitchell *v.* Hender, 23 L. J., N. S., Q. B. 273.

a separate inheritance; for such an exercise of power would not constitute waste. The point, however, is of little practical importance, as it can rarely, if ever, happen, notwithstanding the recent extension of the remedy, that such a temporary tenant would feel justified in proceeding to open mines.

The usual general agreement or covenant to refer all disputes to arbitration will not be allowed to oust the jurisdiction of the superior Courts.

In a lease of a coal mine, the lessee covenanted to raise at least 4,000 tons of coal, and it was agreed that any differences arising respecting any covenant should be settled by arbitration, with mutual covenants to obey the award, and not to bring any action or suit without first submitting all matters to arbitration. It was held, that these provisions could not be pleaded to an action for not raising the stipulated quantity of coal (*c*).

By the Common Law Procedure Act, 1854 (sect. 11), it is provided, that when any differences are agreed to be decided by arbitration under any deed or instrument in writing, and any action or suit shall be commenced, the Court or a Judge, on the application of the defendants, after appearance and before plea in answer, and on being satisfied that no sufficient reason exists for not referring the matter to arbitration, and that the defendants were and are still ready to concur in all acts necessary for that purpose, may order all proceedings to be stayed on such terms as to costs and otherwise as the Court or Judge may think fit, with power to discharge or vary any such order. A Judge may also, by consent, try questions of fact. He may also direct arbitrations in matters of account before trial, and also at the trial, when the issues of fact are left to his decision.

(*c*) Horton *v.* Sayer, 4 Hurl. & N. 643; 29 L. J., Exch. 28. See Scott *v.* Avery, 8 Exch. Rep. 487; Ib. 497; 22 L. J., Exch. 157; Ib. 287; 25 Ib. 308; 5 H. L. Cas. 811.

Equitable defences may now be made to actions at law, under the Common Law Procedure Act, 1854, and injunctions may be granted.

In an action for breach of covenant of a lease, the defendant pleaded an agreement, under which the lease was to be surrendered on certain terms which had been fulfilled on his part, and that he was ready to surrender the lease. But the plea was overruled, on the ground that a Court of Equity would not enforce its remedy without compelling a surrender in writing, and that a Court of Common Law had no power for that purpose (*d*).

A Court of Law will not allow an equitable defence when the effect would be to carry the judgment farther than a Court of Equity would have decreed (*e*), nor in cases where it does not appear that there is any ground for relief in a Court of Equity, nor where the relief would be substantially different (*f*).

By the same act, 17 & 18 Vict. c. 125, s. 79, in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to the same property or right, and he may also in the same action include a claim for damages or other redress.

An injunction will not be granted under this act, unless a Court of Equity would have granted, not only an unconditional, but a perpetual injunction (*g*); nor where a

(*d*) The Mines Royal Society *v.* Magnay, 10 Exch. R. 489; 24 L. J., Exch. 7.

(*e*) Wood *v.* The Copper Miners Company, 17 Com. B. 561; 25 L. J., C. P. 166; The Mines Royal Society *v.* Magnay, supra.

(*f*) Hunter *v.* Gibbons, and Dudley *v.* Gibbons, 1 Hurl. & N. 459; 26 L. J., Exch. 1.

(*g*) Wood *v.* The Copper Miners Company, supra.

plaintiff has an adequate remedy by action (*h*); nor in doubtful cases, where there is no appeal from a Court of Law, and an injunction might be applied for in a Court of Equity (*i*).

SECTION II.

EQUITABLE REMEDIES.

COURTS of Equity have long ago adopted the practice of giving relief, in certain cases, by *injunction*, to restrain persons from working mines. This remedy was always obtainable in cases of waste. It was extended to trespasses in mining cases, for the purpose of preventing irreparable mischief (*k*).

This right has been extended to restrain the taking of valuable stones, or nodules of clay used for making cement, and found on the sea beach (*l*); to restrain waste by a copyholder, at the instance of the lord (*m*); to prohibit an owner, who has a limited right to take stone from a quarry in the land of another owner, from abusing his privilege (*n*); and to prevent a tenant from removing mineral substances deposited in a pool (*o*).

In the last case it was said by Lord Eldon, that throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was

(*h*) Sutton *v.* The South Eastern Railway Co., 35 L. J., Exch. 38; 1 Law Rep., Exch. 32.

(*i*) Ibid.

(*k*) Gibson *v.* Smith, Barn. Ch. Rep. 497; Player *v.* Roberts, W. Jones, 243; Anon., Amb. 209; Grey *v.* Duke of Northumberland, 13 Ves. 236; 17 Ves. 281; Mitchell *v.* Dors, 6 Ves. 147; Whitfield *v.* Bewit, 2 P. W. 240; Flamang's case, cited 7 Ves. 308; Norway *v.* Rowe, 19 Ves. 144; Field *v.* Beaumont, 1 Swanst. 208; 3 Madd. 102; Clowes *v.* Beck, 20 L. J., C. C. 505; 13 Beav. 347.

(*l*) Earl Cowper *v.* Baker, 17 Ves. 128.

(*m*) Richards *v.* Noble, 3 Mer. 673.

(*n*) Thomas *v.* Oakley, 18 Ves. 184.

(*o*) Thomas *v.* Jones, 1 Y. & C., C. C. 510.

acknowledged. The case in which Lord Thurlow first hesitated, was that of a person who, having a close demised to him, began to get coal there, but continued to work under the contiguous close, belonging to another person. It was held, the former, as waste, could be restrained, but, as to the close, not demised to him, it was a mere trespass; and the Court did not interfere. But Lord Thurlow must have changed his opinion, on the ground that the defendant was taking the substance of the inheritance, and granted the injunction (*p*).

An injunction to prevent waste will not be granted against a person in possession at the instance of an adverse claimant of the estate, unless the acts amount to flagrant spoliation. If the claimant is a stranger, without any colour of right, he will be left entirely to his remedy at law, unless the destruction of the estate is threatened. On the other hand, the person in possession will be entitled to an injunction against an adverse claimant when his acts are injurious to the inheritance—as by cutting down trees, and cutting out sods (*q*).

This law will apply to mines, the injury to which is, in fact, more irreparable than in the case of timber. Trees may grow again; but nature will not restore the minerals.

The tendency of the later authorities is to abolish, in cases of injunction, the old distinction between waste and trespass (*r*).

By the Chancery Amendment Act, 1858, the Court has power, in all applications for injunction against any breach of covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, to award damages to the party injured, either in addition to, or in substitution for, such specific performance.

(*p*) See Haigh *v.* Jaggar, 2 Coll. C. C. 231.

(*q*) Lowndes *v.* Bettle, 33 L. J., Ch. 451.

(*r*) Ibid.

The damages may be assessed by the Court, with or without a jury, or by a jury in one of the superior Courts of Common Law.

When a breach of covenant is threatened, and has been partly executed, the Court will award damages in respect of what has already been done (*s*).

A bill for an injunction is generally sustained in connection with an account. But in mining cases an account may be decreed when the injunction is refused (*t*).

In a case where a bill was brought for an injunction to protect coal mines from injury by water flowing from another coal mine, the Court granted the motion, and restrained the defendants from working their mines in any places which might injure or endanger the plaintiff's mines until answer or further order. There was no direction for a trial at law. Evidence was afterwards entered into, and, on the hearing of the cause, the Court refused to make the injunction perpetual, until the plaintiff had established his right at law. The bill was retained for a year, with liberty to the plaintiff to bring an action, and the injunction was continued in the interval (*u*).

In cases of a pressing nature an injunction may be obtained on motion only, and before the answer of the defendant is put in. A contrary decision of Lord Hardwicke has been overruled (*x*). The bill must, in such cases, be actually filed, and be supported by proper affidavits of title, showing an actual or threatened interference.

But a distinction has always been observed with respect to the hasty disturbance of mines in active operation. Mining operations may, in general, be prevented without much permanent injury even to the rightful owner, when

(*s*) Hindley *v.* Emery, 35 L. J., Ch. 6; 1 Law Rep., Eq. 52.

(*t*) Parrott *v.* Palmer, 3 Myl. & K. 632.

(*u*) Duke of Beaufort *v.* Morris, 6 Hare, 340. See also Thomas *v.* Jones, 1 Y. & C., C. C. 510.

(*x*) Lowther *v.* Stamper, 3 Atk. 496.

no expenditure has been incurred, and when no extensive preparations have been made. But the nature of mining requires that the works should be kept in a constant state of repair and activity, and an injunction for causing such operations to be at once suspended might produce a fatal injury, both with respect to the costs of re-commencing the suspended operations, and with respect to rival ownerships, by which the most favourable opportunity for disposing of the produce might be lost. As a general rule, therefore, the Court will not interfere by injunction, on motion, and before the cause is fully heard, in cases where there has been either great expenditure or great delay (*y*). Delay alone, without much expenditure, will of itself sufficiently justify the Court in withholding the summary application of a remedy which is required to be sought for at once, and in the acquisition of which unusual facilities are afforded by the Court. The only ground for so strong a measure is, that a denial of it might be attended with irreparable mischief. If persons are not prompt in proclaiming this mischief, the circumstance may be considered either to refute the extent of the injury, or their title to redress (*z*).

In one case it was observed by Lord Eldon, that the grantees had actually worked the mines from 1808 till 1816, when the action of trespass was commenced—and that action was not brought to trial till 1817. If the defendants had filed a bill to stay the working of the mines, the Court must have refused an injunction to parties who had permitted these operations to proceed from 1808 till 1816, without interruption. To stop the working of a coal mine was a serious injury; and the expenditure incurred

(*y*) Anon., Amb. 209; Grey *v.* Duke of Northumberland, 13 Ves. 236; 17 Ves. 282; Birmingham Canal Company *v.* Lloyd, 18 Ves. 515; Field *v.* Beaumont, 1 Swanst. 208; 3 Madd. 102; nom. Beaumont *v.* Field, 1 Barn. & Ald. 247; Pollard *v.* Clayton, 1 Kay & J. 462.

(*z*) Parrott *v.* Palmer, 3 M. & K. 632.

in the course of eight years would raise an equitable ground to prevent the hasty interference of the Court. The defendants would have been directed first to bring an action, and to return, when the result of the trial had enabled the Court better to deal with the application (*a*).

In another case, the time of delay amounted to two years—and the injunction was refused (*b*).

When a special injunction is granted, it is for the purpose of immediately protecting the rights of those interested in the property. But whether issued in the first instance or not, it will be incumbent on the plaintiff, upon the hearing of the cause, to show just grounds for the relief being granted or continued. The court may then proceed to the final decision of the question, or, as in cases of disputed title, may direct the plaintiff to establish his right in a court of law.

If there be any unnecessary delay in the plaintiff in such a case, in trying an action at law, this delay will in itself form just grounds for dissolving an injunction. Thus, in the case of Grey *v.* The Duke of Northumberland, it was observed by Lord Eldon, after noticing that the action at law had miscarried by means of an error in pleading, in making the defendant a tenant in fee, instead of a tenant for life, that the merits of the question had not been tried from the fault of the plaintiff, which presented a strong case for dissolving the injunction; unless some means of procuring a speedy trial could be insured, he should dissolve it (*c*).

It must always require a strong case on the part of the plaintiff to demand the interference of the Court by injunction in cases of trespass by the working of mines. The remedy cannot be administered on every occasion of injury. There must exist an urgent necessity for so strong

(*a*) Field *v.* Beaumont, 1 Swanst. 204.

(*b*) Birmingham Canal Company *v.* Lloyd, 18 Ves. 515.

(*c*) 17 Ves. 281.

a proceeding; if otherwise, the parties will be left to their remedies at law (*d*).

A motion was made before Lord Hardwicke, to restrain a lessee from working a coal pit irregularly and detrimentally to the lessor. The Chancellor refused the injunction, and observed, that the Court grants injunction to stay the working of a colliery with great reluctance, from the great inconvenience it occasions, and that it never will do it, but where there is a breach of an express covenant, or an uncontroverted mischief (*e*).

In another case, it was observed by Lord Eldon, that the act of stopping a colliery *about to be wrought* might possibly, with reference to rival ownerships, be the means of making it absolutely unproductive twelve months afterwards, when it was to be wrought. The injunction was refused after the delay of two years (*f*).

In another case, the same Judge observed, that inconceivable mischief might ensue from upholding the injunction too long, as the value of the opportunity of working a coal mine, if lost, might never be recovered, especially if it was contiguous to other mines belonging to the same person; and the interposition of the Court must be with a considerable pressure, that on the part of the plaintiff there should be no delay in going to trial (*g*).

An injunction will not be granted when there is reasonable doubt concerning the direction or identity of faults or dykes which are referred to as boundaries (*h*).

It has been doubted, whether after a verdict at law in an action of trespass, in favour of the plaintiff in equity, the Court will afterwards grant an injunction against future trespasses, when the plaintiff refused to produce

(*d*) Elmhirst *v.* Spencer, 2 Mac. & G. 45; M'Curdy *v.* Noak, 17 L. J., N. S., C. C. 165.

(*e*) Clavering *v.* Clavering, 2 P. W. 388.

(*f*) Birmingham Canal Company *v.* Lloyd, 18 Ves. 515.

(*g*) Grey *v.* Duke of Northumberland, 17 Ves. 281.

(*h*) Davis *v.* Shepherd, 35 L. J., Ch. 581.

at the trial documents which are necessary for a fair decision (*i*).

Other instances of the remedy by injunction have been mentioned in the chapter relating to injuries.

When mines are in danger of being ruined before the establishment of any rights relating to them, the Court will entertain a bill of *quia timet*, for quieting the owners in the enjoyment of their rights, and will establish them by decree (*k*).

II. It has been seen, that mining is considered as a species of trade. A bill in equity, therefore, may be brought for an account of the profits (*l*).

The remedy of account has been grounded generally on the expediency of preventing multiplicity of suits. The satisfaction of damages alone is not within the province of the Court; but it presumes, when waste is committed, that it will be repeated (*m*).

The same rule, with respect to delay, applies to an account. If a claimant looks on for a long period, and witnesses great expenditure by other claimants, without objection, he will be entirely left to his remedy at law (*n*).

An owner of a coal mine made a lease of it to a trustee, in trust for five other persons, in equal shares. The lessee entered and worked the mine, which some time afterwards became unprofitable, and was abandoned. The lessee was insolvent; and the lessor brought a bill against him and

(*i*) Field *v.* Beaumont, 1 Swanst. 210.

(*k*) Lord Falmouth *v.* Innys, Moseley 87; Story, Eq. Jur. 860; Sayer *v.* Pierce, 1 Ves. 232.

(*l*) Bishop of Winchester *v.* Knight, 1 P. W. 406; Whitfield *v.* Bewit, 2 P. W. 240; Jesus College *v.* Bloome, 3 Atk. 262; Amb. 54; Parrott *v.* Palmer, 3 My. & K. 632; Story *v.* Lord Windsor, 2 Atk. 630; 1 Ch. Ca. 34; Clavering *v.* Westley, 3 P. W. 402; Pulteney *v.* Warren, 6 Ves. 89; Norway *v.* Rowe, 19 Ves. 144; Rowe *v.* Wood, 2 Jac. & W. 559.

(*m*) 3 Atk. 262; Lee *v.* Alston, 1 Bro. C. C. 194; Bishop *v.* Church, 2 Ves. 104; Yates *v.* Hambley, 2 Atk. 362; Smith *v.* Cooke, 3 Ibid. 381.

(*n*) Parrott *v.* Palmer, supra.

the five partners for the rent, and insisted that as the *cestuis que trust* were to have the profits while the lease continued to be a beneficial one, it was reasonable they should also bear the loss occasioned by it. The Master of the Rolls was of opinion, that, as an action at law lay against the lessee only, the landlord was debarred of any remedy against any other person; and that as the landlord gave credit entirely to the lessee, and made choice of him as the person liable for the rent, the bill ought to be dismissed as against the partners. But this decision was reversed by Lord Talbot, on appeal; and it was decreed that an account should be taken of the amount of rent and sums due to the lessor, which was to be paid to him by the lessee; and in case of his default, that an account should be taken for the purpose of showing whether the lessee had sufficient monies of the partners remaining in his hands to answer their shares of what should be found due to the plaintiff, and if the lessee had not sufficient, that the other defendants should pay the amount to the plaintiff, according to their respective shares (*o*).

When mines are in the possession of assignees, or one of many persons entitled to share in the profits, all the reasonable expenses incurred in the management of the concern will be allowed in taking the account (*p*).

A bill for an account may be brought by the owners or lessees of mines against their agents; and if there are mutual accounts, the Court will restrain all proceedings at law, and direct the whole accounts to be taken in equity. In one case, the agent had received a regular salary previous to his dismissal. He afterwards brought an action for his wages against his former employers. The latter filed a bill to stay proceedings, and for an account, alleging the receipt of various sums by the agent, which had not

(*o*) Clavering *v.* Westley, Clavering *v.* Reed, 3 P. W. 402; Reg. Lib. A. 1735, fol. 526. See remarks on this case, Walters *v.* The Northern Coal Mining Company, 25 L. J., Ch. 640.

(*p*) Scott *v.* Nesbitt, 14 Ves. 445, per Lord Eldon.

been accounted for. The defendant admitted the existence of mutual accounts. But it was contended for him, that the whole question depended upon the amount of compensation to be given to him for his services, and was a question for a jury. It was held, however, by the Court of Exchequer, that if it should become necessary to try the question before a jury, the Court could direct an issue. If the action proceeded, it would have ended in a reference. The master was as good a judge of the matters in issue as a jury could be (*q*).

But a bill for an account will not be supported unless the plaintiff does some act to show his possession.

A lease was made of a coal field, but no possession was taken of it by the lessee. The defendant, who was the owner or lessee of adjoining mines, was charged by the plaintiff with taking coals from the land included in his lease. There were also disputes arising from a confusion of boundaries. Lord Hardwicke said, it was difficult to go through with an action at law in case of an account of the profits of coal mines; and, therefore, the Court would go farther than in other cases. But the bill was the same as a bill for an account of rents and profits of an estate, which cannot be maintained merely on a legal title, unless there is infancy or something in the way, so that no recovery could be obtained without it. An ejectment would have determined the right; and if the bill had been merely on account of the profits, it must have been dismissed; but being to ascertain the boundaries, the plaintiff might, if he recovered, want that relief; and then if leave were given to bring an ejectment abstracted from the direction of the Court, he must bring a new bill; and if it were dismissed entirely, he would be deprived of an injunction if wanted. The bill was then directed to be retained for a year, with liberty for the plaintiff to bring an action of ejectment (*r*).

(*q*) Crease *v.* Penprase, 1 Jurist, 840, Ex. Eq.; 2 You. & C. 527.

(*r*) Sayer *v.* Pierce, 1 Ves. sen. 232.

The mine, in the above case, formed a possession distinct from that of the surface. If it had not been distinct, the objection could not have been raised, unless it was also applied to the general inheritance.

A bill for an account may be brought by the mortgagor of mines against a mortgagee in respect of the proceeds arising during the period of his possession. In such cases, the mortgagee must account, not only for what he has actually received, but for what he might have received, but through his gross mismanagement or wilful neglect (*s*). But, as we have already seen, he will not be liable to account for any supposed benefits which might have resulted from any speculations in improvement, or from a more extensive scale of expenditure than is required from a prudent owner (*t*). When the expenditure is proper, but unprofitable, interest will be allowed (*u*).

The remedy of account between partners has been already considered (*x*). A partner will not be bound to account in so particular a manner as a mortgagee (*y*), for the acts of the former are identified with those of his co-partners, who must, in due time, take measures for controlling his imprudent operations, and must, as in other respects, endure the consequences incident to the contract of partnership.

When the relations of a mortgagee and a partner are united in the same person, it has been doubted by Lord Eldon, whether an account should be directed with respect to the former or the latter character. But the mortgagee partner was eventually declared to retain the possession of the mine in his character of mortgagee only. It is presumed, if a person takes possession as mortgagee, he must also account as a mortgagee. If he acquire the advan-

(*s*) Anon., 1 Vern. 35; 1 Eq. Ca. Ab. 327; Hughes *v.* Williams, 12 Ves. 493.

(*t*) See Chap. IV.

(*u*) Norton *v.* Cooper, 25 L. J., C. C. 121; 5 De G. M. & G. 728.

(*x*) Chap. X. Sect. 5.

(*y*) Rowe *v.* Wood, 2 Jac. & Walk. 556.

tages resulting from the assumption of a higher character, it is only reasonable that he should bear the inconveniences. In the above case, the mortgagor was declared to have a clear right to insist that regular accounts should be kept of all receipts, payments and transactions relating to the mine, and to have constant access for the purpose of inspecting the accounts (*z*).

A bill was filed for an account of stone taken from a quarry, under an agreement that stipulated for the keeping of proper accounts. The bill alleged that accounts had been kept. The defendants, in their plea, denied the agreement, but did not deny the allegation as to accounts having been kept. Lord Eldon overruled the plea on this ground (*a*).

In another case, the bill was retained for a year, to enable the plaintiff to try an action as to the quantity of coals contained in a stack by the custom of the country, the render being 1*s.* per stack (*b*).

Joint tenants and tenants in common have, by statute, a remedy at law for an account against each other (*c*). The equitable relief is not affected; but when there has been negligence in the discovery of a mistake, the account will be limited to six years, in accordance with the statute (*d*).

The clauses contained in deeds for referring disputes to arbitration are not binding, so as to exclude the jurisdiction of a Court of Equity (*e*).

In a case of alum works, there was a covenant by the lessee to leave stock of a certain amount upon the premises. There was a fair ground of suspicion, that he did not mean to perform this covenant. Lord Eldon decided, that, though there might be compensation in damages, there was a reference to that sort of enjoyment for which

(*z*) Rowe *v.* Wood, 2 Jac. & Walk. 559.

(*a*) Jones *v.* Davis, 16 Ves. 262.

(*b*) Geast *v.* Barber, 2 Bro. C. C. 61.

(*c*) 4 Anne, c. 16, s. 27.

(*d*) Denys *v.* Shuckburgh, 4 You. & C. 42; see Chap. IV.

(*e*) Earl of Mexborough *v.* Bower, 7 Beav. 127. See last section.

the landlord had stipulated after the expiration of the term, and he decreed, by way of *quia timet*, the performance of the covenant. This decision was afterwards confirmed in the House of Lords (*f*).

We have seen before that a Court of Equity will also, in certain cases, appoint a receiver or manager (*g*).

It has been decided, that the Irish Statute, 11 & 12 Geo. 2, c. 10, does not authorize the appointment of a receiver over mines in the possession of the respondent; and that the Court will not order, upon a mortgage petition, the letting of any property which was not producing rent at the time when the receiver was appointed (*h*).

A bill in equity may be brought for determining questions of disputed boundaries in mining fields (*i*).

A Court of Equity will assist foreign tribunals to unravel complicated matters relating to mines, and will, so far as the law allows and jurisdiction extends, carry into effect the judgments of foreign Courts duly brought to knowledge (*j*).

The Court will make a declaration of lien on foreign mines in favour of a plaintiff who can substantiate such a claim, and will even appoint a receiver. The plaintiff must himself make the lien available by means of the foreign Courts. But where no privity exists between the parties, and the principal defendants are foreigners, such a declaration will not be made (*k*).

An equitable jurisdiction is now conferred on the County Courts by 28 & 29 Vict. c. 99. Amongst other matters,

(*f*) Ward *v.* Duke of Buckingham, cited 10 Ves. 161.

(*g*) Chap. X. Sect. 5; Jefferys *v.* Smith, 1 Jac. & W. 298; Norway *v.* Rowe, 19 Ves. 144; Rowe *v.* Wood, 2 Jac. & W. 556.

(*h*) Frere *v.* The Hibernian Mining Company, 2 Hog. 30.

(*i*) Sayer *v.* Pierce, 1 Ves. sen. 232.

(*j*) Norris *v.* Chambers, 30 L. J., Ch. 285.

(*k*) Ibid.

suits may be brought for an account, or administration of assets, for the execution of trusts, for foreclosure, redemption, or for enforcing any charge or lien, for specific performance, or for delivering up or cancelling any agreement for the sale or purchase of any property, for the dissolution or winding up of any partnership, and for injunctions and staying proceedings at law. But the whole subject-matter must not exceed 500*l.* in value. There is also a right of appeal to the Court of Chancery.

The peculiar remedies relating to mines in Cornwall and Derbyshire will be noticed in another chapter.

Section III.

WORKING OUT OF BOUNDS.

There is no more fertile cause of annoyance to mining owners than the working out of bounds. For it not only is a serious trespass, in itself, often involving much loss of property, but it may occasion irremediable disasters to mining works. The premature bursting of barriers may occasion the most fatal effects, both to property and to life. For this evil a very inadequate remedy is provided.

The remedy at law is an action of trespass. The measure of damages in such cases is the full value of the minerals as soon as they are severed from the freehold. If they have been brought to the day and disposed of, the amount may be estimated by deducting the cost of transit from the place of working from the value at the mouth of the pit or level. This does not preclude any other mode of fixing the amount, according to the above rule. But no deduction can be made for the cost of working, nor for the dues of the lessor (*l*).

(*l*) Martin *v.* Porter, 5 M. & W. 351; Morgan *v.* Powell, 3 Q. B. 278; 11 L. J., N. S., Q. B. 268; Wood *v.* Morewood, 3 Q. B. 440; Wild *v.* Holt, 9 Mee. & W. 672; 11 L. J., N. S., Exch. 285. See Fisher *v.* Pimbley, 11 East, 188.

The action of trespass is limited by statute to six years from the time of the cause of action, without reference to the period of discovery (*m*). These acts are often first discovered after a great lapse of time.

The only ground for excluding or extending the statute would be fraud and mistake. It has been distinctly held, at law, that fraud will not prevent the statute from running (*n*).

In an action at law for working coal wrongfully, the defendant had pleaded the Statute of Limitations. The plaintiff replied, that the wrong was fraudulently concealed from him until within six years before suit. But the replication was disallowed on the grounds, that fraud was no answer at law to a plea of the statute, that a Court of Equity would not restrain the defendant from setting up the defence, and that, if there was any right to equitable relief, it could only be demanded by a bill for an account, in which the amount allowed would differ from the amount recoverable in a Court of Law (*o*).

It has also been held in equity, that the statute may be a good defence to a bill of discovery which is filed for aiding an action at law, when the remedy is clearly at law (*p*). But it has also been well established by numerous decisions, that when a Court of Equity exercises its own *direct* jurisdiction, as in bills for account and injunction, and for discovery connected with these remedies, the Statutes of Limitation will not be suffered to be pleaded in bar. This rule is not considered to be in disobedience to positive statutes. For a Court of Equity cannot be prevented from doing justice according to good conscience, when the equitable title to relief is not barred by lapse of time. In

(*m*) 21 Jac. 1, c. 16, s. 3.

(*n*) The Imperial Gas Company *v.* The London Gas Company, 10 Exch. 39; 23 L. J., N. S., Exch. 303; Blair *v.* Bromley, 5 Hare, 542; 2 Ph. 354; 16 L. J., N. S., C. C. 495.

(*o*) Hunter *v.* Gibbons, Dudley *v.* Gibbons, 1 Hurl. & N. 459; 26 L. J., Exch. 1.

(*p*) Smith *v.* Fox, 6 Hare, 386; 17 L. J., N. S., C. C. 170.

short, the cause of suit or action may be said to arise in a Court of Equity from the time when the right to appeal to its jurisdiction first arises. In cases of fraud or mistake, therefore, it runs only from the discovery (*q*), or from the time when the discovery might, with due diligence, have been made (*r*).

In a suit in equity, therefore, for an account of minerals wrongfully taken from the lands of others, either in waste or trespass, it may be considered clear, as a general rule, that, in cases of fraud, the statute cannot be pleaded in bar, if the fraud has been first discovered within the period of six years from the filing of the bill (*s*).

But it is not always, in such cases, that fraud can be alleged, and rarely that it can be distinctly proved. The entire want of plans of the mines and the works, the imperfect measurement of boundaries, and many false pretences of justification, may give a wide field for misconduct and trespass. If a lessee has worked out of bounds, into other lands of the same lessor, and has furnished an unjust account of sums due for rent, leaving a large quantity unaccounted for, a case of fraud may be well presumed. In cases where the wrongful working has been into the lands of other owners, some proof of fraud might also be gathered from the insufficient payment of rents to the acknowledged landlord. But such frauds are often very difficult both of actual detection, and, after that, of positive proof. It becomes, therefore, important to inquire whether the statute may be excluded on any other grounds.

As a general rule, a Court of Equity will apply the same relief in cases of mistake as of fraud (*t*). If the mineral

(*q*) Whalley *v.* Whalley, 3 Bligh, 1; Booth *v.* Lord Warrington, 4 Bro. P. C. 163; Hovenden *v.* Lord Annesley, 2 Sch. & L. 634; Bond *v.* Hopkins, Ibid. 413, 431; South Sea Company *v.* Wymondsell, 3 P. W. 143; Deloraine *v.* Browne, 3 Bro. C. C. 633.

(*r*) Denys *v.* Shuckburgh, 4 You. & C. 42.

(*s*) Hunter *v.* Gibbons, supra; Dean *v.* Thwaite, 21 Beav. 621.

(*t*) Brooksbank *v.* Smith, 2 You. & C. 58.

has been ascertained to have been wrongfully taken, and without any intention of fraud, there must, at least, in such cases, have been misappropriation, misapprehension, or *mistake*, which has been defined to be, that result of ignorance of law or of fact, which has misled a person to commit that which he would not have done if he had not been in error (*u*). It is a well-known maxim, in equity as well as at law, that ignorance of the law excuses no one for breach of duty. It is equally clear, that a wrongful act, committed in innocent and mutual ignorance of facts, may be the subject of equitable relief. But this relief will much depend upon the degree of care and circumspection bestowed by either party. If the parties are equally innocent, or equally guilty, a Court of Equity will refuse to interfere. Its maxim is—*in pari delicto melior est conditio possidentis et defendentis.* This may be no defence at law, if the remedy is sought within the six years. In that case equity will follow the law and give relief. Beyond that period it also follows the law, but withholds relief according to its own rules. It is, therefore, important to ascertain if the party, either seeking or refusing relief, has been wanting in reasonable diligence.

With respect to the trespasser it may be urged, that every occupier is bound, at his own peril, to know the limits of his property. A tenant is not only under an obligation to know, but also to preserve bounds (*v*). There is no difficulty in acquiring this knowledge in mining works under the surface. As exact knowledge is much more necessary than on the visible surface, the want of it is the more culpable. Unless he has been wilfully misled by those who seek relief against him, he ought to suffer the consequences of his own imprudence. He ought also to verify all important statements for himself, from whatever source they come. In one case, where the Court limited the account of coal wrongfully taken to six

(*u*) Jeremy, Eq. J. B. 3, p. 2, 358.
(*v*) Attorney-General *v.* Fullerton, 2 Ves. & B. 263.

years, and a certain amount of abstracted coal had been proved, it was thrown on the trespasser to show that the whole had not been taken within that time (*w*).

On the other hand, the conduct of the party seeking relief will also be subject to scrutiny, if he seeks to annul the operation of the statute. For a Court of Equity administers relief, in such cases, in the spirit of an ancient proverb, and helps them that help themselves. Thus, if it can be shown, as in the case of a lessor, that the plaintiff had free access to the place of injury, and had neglected to protect himself by the employment of agents or other usual means, his claims must be regarded with some disfavour. The same feeling might arise in cases where his own conduct has been uncertain, or where he has disregarded any reasonable grounds of suspicion (*x*). In many cases of this kind there might be circumstances which would preclude, or, at least, limit relief. The result would, therefore, be *damnum absque injuriâ*.

It may be added, that a Court of Equity will not interfere in cases where a greater injustice or inconvenience would follow than that which is sought to be redressed. Thus, if the conduct of a defendant could be shown to be free from blame, and a long space of time had elapsed, during which he had expended the profits of the trespass more freely than he would probably have done if he had known they belonged rightfully to another, there might be just ground for refusing all interference.

The measure of damages will also, in cases of relief, depend on the conduct of the parties. In cases of actual fraud, a Court of Equity would probably follow the cases decided at law, above cited, which give compensation without any deduction for the costs of working. In aggravated cases of mistake, the same rule might be applied. In other cases compensation will be confined to

(*w*) Dean *v.* Thwaite, 21 Beav. 621; see Powell *v.* Aiken, 4 Kay & J. 343.

(*x*) Ibid.

the actual profits accruing, or which might have been fairly acquired, from the trespass. The market price of the mineral at the mouth of the mine will be taken, and all just allowances be made for the costs of working (*y*). In one case between lessees of adjoining mines, at *nisi prius*, the defendants insisted that the common lessor had pointed out the place of trespass as abandoned by the plaintiffs. The jury were directed to deduct the costs of removing the mineral and of the royalty, and also to find whether the defendants had acted under a reasonable and *bonâ fide* belief that they had a right to take the mineral. Leave was then given to move for an increase of the damages by the amount of the royalty (*z*).

Attempts have been made to treat trespasses of this kind as cases of felony under the statute noticed in the next section. But these proceedings have always failed from the difficulty of proving the intention to steal or *animus furandi*. There are generally sufficient means of escaping from this charge, even in cases where the guilt has been undoubtedly incurred. In one case, in 1848, where the Justices had committed the trespassers for trial, the Attorney-General directed a *nolle prosequi* to be entered.

In a case, where a bill was filed for an account of coal against the representatives of the lessees of a mine, who had worked out of bounds, the defendants pleaded the statute in respect of the account, and averred that they had not taken on themselves the performance of the covenants in the lease. It was held, that the two pleas were inconsistent (*a*).

In a case where the trespasser was dead, and the acts continued to be committed after his death, it was held, that his administrator was liable, in trespass, for the coal

(*y*) Powell *v.* Aiken, 4 Kay & J. 343. See Chap. IV, Sect. 2.

(*z*) Scaddick *v.* Haines, MS. 1854, per Wightman, J.

(*a*) Emmott *v.* Mitchell, 17 L. J., N. S., C. C. 179; 14 Sim. 432.

taken after his death, and in *assumpsit* for money had and received for the coal previously taken (*b*).

In cases of partnership, an innocent partner may become liable for a breach of trust; for the fraudulent representations of one partner are held to be the acts of the firm (*c*). The same rule applies to trespasses of this kind, whether fraudulent or felonious (*d*).

It will be seen, from the above statement, that the remedies for these trespasses, in whatever spirit they are committed, are very deficient. It is believed there are few mining districts in England where a kind of legalized robbery does not daily take place. But they are often undiscovered till the statute permits the delinquents to escape. It would be a proper provision that the legal remedy should begin only from the time of discovery, when that period is not postponed by the negligence of the parties who seek redress. In cases of concealed fraud, the recent Statute of Limitations, relating to the recovery of land, has enforced this rule on Courts of Equity (*e*). Another remedy might be found in giving a larger, readier, and less costly right of inspection to those who have good grounds for suspecting mischief. The powers given to the official inspectors of mines may be useful for promoting discovery (*f*). But a more complete remedy would be afforded by a proper system of registration of all mining operations, which is no less required for the present purpose, than as a measure of national importance (*g*).

A Court of Equity, however, will grant an order for inspection on any reasonable grounds of suspicion. In one case an owner of coal mines showed good ground for supposing a trespass from neighbouring coal owners, and

(*b*) Powell *v.* Rees, 7 Ad. & E. 426; 8 L. J., N. S., Q. B. 47.

(*c*) Blair *v.* Bromley, 5 Hare, 542; 16 L. J., N. S., C. C. 495; 2 Ph. 354.

(*d*) See Chap. X.

(*e*) 3 & 4 Will. 4, c. 27, s. 26.

(*f*) See Chap. XIV.

(*g*) See Preface.

was unable to ascertain in his own lands whether any such acts had been committed. An order was granted for inspecting the neighbouring works, and another order was afterwards granted for the repair and ventilation of the mine (*h*).

Any obstructions to a fair inspection will be ordered to be removed. In the case just cited, the defendant had filled up certain passages with the refuse, and they were ordered to be opened out.

In another case, the defendants had erected framed dams and barriers, which caused that part of the mine, where the trespass was alleged to have been committed, to be filled with water. The erections might have been made, either *bonâ fide* for keeping out the water from their own mine, or for preventing any examination. It was ordered that the defendants should remove the framed dams and barriers as the viewers should direct, and that the viewers should cause them to be removed, unless they should be of opinion that the colliery of the defendants would be thereby destroyed (*i*).

Powers of inspection may also be implied from the relative situation of the parties arising from contract (*k*).

A bill was filed for an account of coal and ironstone alleged to have been wrongfully worked out of the plaintiff's colliery, and the plaintiff prayed for leave to inspect the workings of the defendant through his pits and works. The latter had formerly worked the plaintiff's colliery under a lease, and he alleged that no plan or inspection would show that any more coal had been got than what was rightfully got during his tenancy. He denied any entrance on his part into the plaintiff's mine. The plaintiff relied on information and belief, and particularly on an affidavit made by a discharged workman of the defendant,

(*h*) Lonsdale (Earl) *v.* Curwen, 3 Bligh, 168, n.

(*i*) Walker *v.* Fletcher, 3 Bligh, 172, n. See East India Company *v.* Kynaston, Ibid. 153; 3 Swanst. 248; Browne *v.* Moore, 3 Bligh, 178, n.

(*k*) Blakesley *v.* Wieldon, 1 Hare, 176; 11 L. J., N. S., Ch. 164.

alleging conversations among the miners about the workings being under a barn on the plaintiff's land. The agent of the defendant alleged, in his affidavit, that he had dialled the workings, and that they had not approached within twenty yards from the boundary, and that the mine being 190 yards in depth, the miners could not tell in what direction the gateways were being driven. But the Court granted an order for inspection, on the ground that such an order only requires a *primâ facie* case, and that this case had not been sufficiently contradicted by the defendant. The plaintiff was allowed, on giving one clear day's notice, to inspect the mine of the defendant, by himself or his agents, so far as was necessary for the purpose, with liberty to use the defendant's machinery, to measure and dial the mine, and make plans of the workings (*l*).

An inspection may also be procured, after action brought, from a Court of Common Law, and similar directions will be given for removing obstructions. By the Common Law Procedure Act, 1854 (sect. 58), it is provided, that the Court or a Judge may order an inspection by the jury or the parties, or their witnesses, of any real or personal property, if such inspection be material to the question in dispute. The rules in force relating to views by a jury are made applicable for the inspection.

In an application under this provision, it appeared, that the plaintiff had obtained leave from the defendants to examine their coal mines, and had found that a wall had been lately built on the boundary of the two mines. This wall had prevented him from looking beyond into his own mine, to see if any of his own coal had been wrongfully worked. The district inspector of mines, in pursuance of an order of a Judge, was allowed to examine the wall, and he reported that a sufficient inspection could be safely made by removing a portion of the wall. An order was

(*l*) Bennitt *v.* Whitehouse, 28 Beav. 119; 29 L. J., Ch. 326; Adshead *v.* Needham, cited there.

then made by a Judge at chambers for inspection, and, so far as was necessary, for making a driftway through the wall, as described in the inspector's report—the plaintiff giving security to the extent of 500*l.* for indemnifying the defendants against any damage arising from the inspection, as found by the Court. It was held by the Court, that the Judge had a right to direct the removal of obstructions to inspection, and that the order was valid (*m*).

Section IV.

CRIMINAL OFFENCES.

The criminal offences relating to mines have been provided for by several recent statutes.

The offence of setting fire to coal mines was formerly punishable by death. But it is now enacted, that any one unlawfully and maliciously setting fire to any mine of coal, or cannel coal, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for not less than fifteen years, or to be imprisoned for any term not exceeding three years (*n*).

If any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up or obstruct any airway, waterway, drain, pit, level or shaft of or belonging to any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported for seven years, or to be imprisoned for any term not exceeding two

(*m*) Bennett *v.* Griffiths, 30 L. J., Q. B. 98; see Ennor *v.* Barwell, 1 De G. F. & J. 529; The Attorney-Gen. *v.* Chambers, 12 Beav. 159.

(*n*) 7 Will. 4 & 1 Vict. c. 89, s. 9, repealing 7 & 8 Geo. 4, c. 30, s. 5.

years, with or without hard labour, and with or without solitary confinement, such confinement not exceeding one month at any one time, nor three months in any one year (*o*); and, if a male, to be once, twice or thrice publicly or privately whipped in addition to the imprisonment. But it is provided, that this enactment shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working (*p*).

If any person shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy, or to render useless, any steam-engine or other engine (*q*), for sinking, draining or working any mine, or any staith, building or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk, for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggonway or trunk be completed, or in an unfinished state, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments last mentioned (*r*).

By an amending statute, 23 Vict. c. 29, it is enacted, that if any person shall unlawfully and maliciously pull down, or destroy or damage with intent to destroy, or to render useless, or shall stop, obstruct or hinder the working of any steam-engine or other engine, or of any appliance or apparatus in connexion therewith, for sinking, draining or working any mine, or for in anywise assisting in the working thereof, with intent thereby to destroy or damage such mine, or to hinder, obstruct or delay the working thereof, every such offender shall be guilty of felony, and be liable to any of the punishments for such offences named in 7 & 8 Geo. 4, c. 30, s. 6. The jurisdiction of the admiralty is reserved.

The above provisions are confined to cases in which the

(*o*) 7 Will. 4 & 1 Vict. c. 90, s. 5.

(*p*) 7 & 8 Geo. 4, c. 30, s. 6.

(*q*) See R. *v.* Whittingham, 9 Carr. & P. 234.

(*r*) Sect. 7.

minerals are worked by means of *mines;* and that they will be totally inapplicable to quarries and works carried on in the open day, if the mineral obtained be of the greatest value. The definition of a mine has already been noticed (*s*).

If workmen stop up an airway, by order of their master, in part of his mine to which he has no right, it is not felony in the workmen, unless they knew, not only of the want of right, but also that it is a malicious act on the part of the master (*t*).

In a prosecution under 7 & 8 Geo. 4, c. 30, an owner had directed workmen to stop up an airway communicating with an adjoining mine. They believed he had a right to give the order, and acted *bonâ fide;* and they were acquitted, though the owner knew he had no right to stop up the airway (*u*).

It is also enacted, that if any person shall unlawfully and maliciously cut, break or destroy, or damage with intent to destroy, or to render useless, any machine or engine, whether fixed or moveable, prepared for, or employed in, any manufacture whatsoever (except several manufactures of silk and other goods, otherwise provided for), every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to the punishments described in the sixth section before mentioned (*x*).

There is still, however, no specific remedy for offences to machinery and works used in raising minerals by any other means than mining; for the machinery mentioned in the last section is such as is used "in any manufacture." These words will, of course, extend to the machinery used in smelting, refining, and various other processes to which minerals are exposed, but not to that used in merely working the minerals by open excavations, and preparing them for the market, or for use in their natural state.

(*s*) See Chap. XII. Sect. 3.
(*t*) Reg. *v.* James, 8 C. & P. 131.
(*u*) Reg. *v.* Norris, 9 Carr. & P. 241. See Reg. *v.* Foster, 4 Cox, 25.
(*x*) Sect. 4.

Malicious injuries, however, relating to machinery employed for these purposes will be included, but often inadequately, in the twenty-fourth section of the same act, relating to petty trespasses, by which it is provided, that, if any person shall wilfully or maliciously commit any damage, injury or spoil to or upon any real or personal property whatsoever, for which no remedy or punishment is thereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit such sum of money as shall appear to be a reasonable compensation for the injury, not exceeding the sum of five pounds, to be paid to the party aggrieved, except when such party has been examined in proof of the offence, and, in such case, and also in the case of property of a public nature, to be applied as a penalty under the general provisions of the act, to the county rate fund. In default of payment, the offender may be imprisoned and kept to hard labour for any term not exceeding two months. The section excepts from its operation any party trespassing under a reasonable supposition that he had a right to do the thing complained of, and any trespass, not wilful and malicious, in pursuit of game (*y*).

The last section will not only apply to injuries to machinery used in quarries or open works, but also to injuries to the minerals themselves, whether severed from the freehold or not. The offender may be brought before one justice only. But the compensation or penalty cannot exceed five pounds.

Injuries committed upon mining machinery, in cases of riot, have been provided for by the same statute. It is enacted, that if any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down or destroy, or *begin* to demolish, pull down or destroy, any building or erection used in carrying on any trade or

(*y*) 7 & 8 Geo. 4, c. 30, s. 24.

manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine or other engine for sinking, draining or working any mine, or any staith, building or erection used in conducting the business of any mine, or any bridge, waggon-way or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon (*z*).

This provision does not extend to quarries.

The punishment of death is now abolished for these offences, and transportation for life, or for seven years, or imprisonment, with or without hard labour, for three years, are substituted (*a*).

An aqueduct, or wooden trough, was used for conveying water from a distance to a pond, half a mile from the mine. The water was used for washing the ores of the mine, and the slag ore obtained from old refuse heaps. The aqueduct was held to be within the act, as an erection used in *conducting the business* of the mine (*b*). This is a question for the jury, and not for the Court.

A scaffold, erected above the bottom of a shaft which was flooded with water, for the purpose of working a bed of coal above the level of the water, was held to be within the statute. But a cylinder or drum for taking up the rope of a mine, and moved by a steam-engine, is not so connected with the latter as to suffice for an indictment relating to it only (*c*).

An action may be maintained against the hundred for a riotous destruction, in whole or in part, of property of the same kinds. The persons injured must go before a justice of the peace within seven days from the commission of the offence (*d*).

(*z*) 7 & 8 Geo. 4, c. 30, s. 8.

(*a*) 4 & 5 Vict. c. 56, and 6 Vict. c. 01.

(*b*) Barwell *v.* Winterstoke, 19 L. J., N. S., Q. B. 206.

(*c*) Reg. *v.* Whittingham, 9 C. & P. 234.

(*d*) 7 & 8 Geo. 4, c. 31.

Negligence in blasting stone in a quarry, whereby large pieces of stone are projected, so as to endanger the safety of persons in houses, and in the adjoining highways, is a misdemeanor, indictable at common law (*d*).

The offence of stealing minerals is now regulated by the statute 7 & 8 Geo. 4, c. 29. By the common law, larceny could only be constituted by taking things of a purely personal nature. Thus, the stealing of growing corn or apples was a trespass, not a larceny. The same principle was applied to minerals. If they were severed from the freehold by the thief, and immediately taken away by him, it was considered only a trespass; but if the removal by the thief took place at a different period than the time of severance by him, the offence of removal amounted to felony (*e*). This distinction is now destroyed by the above act, by which it is enacted, that, if any person shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke or black lead, or any coal or cannel coal, from any mine, bed or vein thereof respectively, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny (*f*).

This section is confined to the stealing of the metallic ores, and the other minerals particularly specified. The stealing of other minerals will, therefore, only constitute a larceny at common law, and will be subject to the rules just mentioned, as applicable in all cases before the passing of the statute. But the punishment is regulated by the statute (*g*), and has just been mentioned. The statute of 25 Geo. 2, c. 10, with respect to thefts and robberies from black lead mines, is repealed by 7 & 8 Geo. 4, c. 27.

If any person employed in or about any mine, in the county of Cornwall, shall take, remove or conceal the ore

(*d*) Regina *v.* Mutters, 10 Cox, C. C. 26; 34 L. J., M. C. 22.

(*e*) Lee *v.* Risdon, 7 Taunt. 191; 2 Marsh. 495; 1 Hawk. c. 33, s. 1; 1 Hale, 510.

(*f*) 7 & 8 Geo. 4, c. 31, s. 37.

(*g*) Sect. 3.

of any metal, or any lapis calaminaris, manganese, mundick or other mineral found or being in such mine, with intent to defraud the proprietors, or any workman or miner employed therein, such offender shall be guilty of felony, and shall be liable to be punished as for simple larceny. The act was confined to Cornwall. It is now extended to Devon by 18 Vict. c. 32, s. 28.

An indictment, under this act, must sufficiently aver that the miner was *in the* mine at the time of removal. The usual words "then and there" may refer only to the venue (*h*).

The Act of 56 Geo. 3, c. 73, for removing difficulties in the conviction of offenders stealing property from mines, arising from mining partnerships, is repealed by the 7 Geo. 4, c. 64 (*i*). But it is enacted by the same statute, that in *any indictment or information for any felony or misdemeanor*, it shall be sufficient to name one owner, and to state the property to belong to the person so named and another or others; and this provision is to apply to all joint stock companies and trustees (*k*).

The act for the regulation and inspection of coal mines, afterwards noticed, authorizes the adoption of special rules, for the breach of which the offender may be fined or imprisoned. By a special rule under this act for regulating a coal mine in Shropshire, an agent, called a chartermaster, was to be the responsible manager of the pit, and another person, called the banksman, was to take care that no more than eight persons were to descend the pit at one time. The banksman, who was the servant of the chartermaster, broke this rule by allowing more than eight men to descend, and the chartermaster was close by, and was cognizant of the offence. The latter was held to have

(*h*) Reg. *v.* Trevenner, 2 M. & R. 476.

(*i*) Sect. 32.

(*k*) Sect. 14.

been properly convicted of aiding and abetting the banksman to violate the rule (*l*).

Besides the statutory provisions, proceedings may still be taken at common law.

A ground bailiff of a coal mine was indicted for manslaughter in an explosion of gas which killed nineteen men. He was charged with the duty of ventilation and with negligence. Maule, J., directed the jury, that if it was the plain duty of the prisoner to direct the air-headings to be made, and he omitted ordinary precaution, he was guilty, whether other persons had been guilty of omission or not (*m*).

In like manner, a banksman, whose duty it was to place a stage on the mouth of a shaft, to receive a loaded truck from a tramway, and who neglected to place the stage, whereby the truck fell down the shaft and killed a workman, was held guilty of manslaughter (*n*).

In another case, a person was found guilty, whose duty it was to attend to the steam engine by which the miners were drawn up the shaft, and who left it to the care of an incompetent person, who drew up the basket too far, whereby one of the miners in it was thrown down the shaft and killed (*o*).

Section V.

DISPUTES WITH WORKMEN AND AGENTS.

I. *Contracts of Service.*
II. *Specific Work.*
III. *Truck Act.*
IV. *Combinations.*
V. *Injuries to Workmen.*
VI. *Agents.*

I. Several statutes have been passed for the settlement of disputes between masters and servants,—for the proper

(*l*) Howells *v.* Wynne, 32 L. J., M. C. 241.

(*m*) Reg. *v.* Haines, 2 Car. & K. 368.

(*n*) Reg. *v.* Hughes, 26 L. J., M. C. 202; D. & B. 248. See Reg. *v.* Bennett, 28 L. J., M. C. 27.

(*o*) Reg. *v.* Lowe, 4 Cox, 449.

performance of contracts on the part of the workmen, and for the recovery and payment of their wages. These provisions are not always applicable to persons employed in mines.

All complaints and disputes between masters and miners, colliers, keelmen, pitmen and other labourers employed *for any certain time* may be determined by one or more justices of the peace of the county or place where the master inhabits, who may examine any such miner or other labourer upon oath, or any other witnesses, and make any orders for the payment of wages, not exceeding five pounds, within such period as the justice or justices shall think fit, and, in default of payment within twenty-one days, a warrant may be issued to levy the amount by distress and sale of the goods of any master or employer; and every such order is *final and conclusive* (*p*).

The act only applies to persons engaged in manual labour, and not to stewards, overlookers or agents (*q*).

On the other hand, the justice or justices, upon complaint made upon oath by any master or employer against any such labourer, concerning any misdemeanor or ill behaviour, *in the service*, may examine and determine such complaint, and punish the offender by commitment to the house of correction, to hard labour, for a period not exceeding one month, or by abating some part of the wages, or by discharging such labourer from his employment. In like manner, upon a similar complaint, upon oath, a master or employer may be summoned to answer concerning any misusage, cruelty or other ill treatment towards any such labourer, and, upon proof thereof being made, and of the service of the summons, if the former shall not appear, such labourer may be discharged from his employment, under the hands and seals of the justice or justices, *gratis* (*r*). An appeal may be made to the next General

(*p*) 20 Geo. 2, c. 19, s. 1, amended by 4 Geo. 4, c. 34, s. 5.

(*q*) Davies *v.* Baron Berwick, 30 L. J., M. C. 84.

(*r*) 20 Geo. 2, c. 19, s. 2.

Quarter Sessions in all cases, except from an order of commitment (*s*), which may award costs to the amount of forty shillings, to be levied by distress and sale (*t*). But no writ of certiorari may be issued for removing the proceedings into the superior courts of law (*u*).

All the above provisions are extended to the tinners and miners employed in the Stannaries of Devon and Cornwall, but not so as to prevent any person from applying, as before, to the Stannary Courts (*x*).

If any miner, collier, keelman, pitman, labourer or other person shall contract with any one *for any certain period*, and shall absent himself from his service before the completion of the term, or be guilty of any other misdemeanor, any such justice of the county or place in which such labourer shall be found, upon complaint made upon oath (*y*) by the person contracted with, or his steward or agent, may issue his warrant for apprehending the miner or labourer, and may commit him to the house of correction for not more than three months, and not less than one month. An appeal is given to the next General Quarter Sessions, upon giving six days' notice to the justice or justices of the intention, and of the ground of the appeal, and entering into a recognizance within three days after the notice, before some justice of such county or place. The Court of Sessions, upon proof of the notice and recognizance, is to give proper and reasonable relief and costs to the parties appealing or appealed against. These provisions do not extend to the Stannaries of Devon and Cornwall (*z*).

If any miner or other person shall contract to serve any persons for any time, or in any other manner, and shall not enter into or commence the service according to the contract (such contract being in writing, and signed by the

(*s*) Rex *v.* Justices of Staffordshire, 12 East, 572.

(*t*) 20 Geo. 2, c. 19, s. 5.

(*u*) Sect. 6.

(*x*) 27 Geo. 2, c. 6, ss. 2, 3.

(*y*) See Finley *v.* Jowle, 12 East, 248.

(*z*) 6 Geo. 3, c. 25, ss. 4, 5, 6.

parties), or having entered shall absent himself before the term of his contract, whether the contract be in writing or not, or neglect to fulfil it, or *be guilty of any other misconduct or misdemeanor*, he may, upon complaint made upon oath by the person contracted with, or their agents, to any justice of the place where the offender may be employed or found, or shall have contracted, be apprehended under a warrant from the justice, and may be committed to the house of correction for hard labour for not more than three months, and a proportionate part of his wages may be abated during the imprisonment, or the offender may be punished by abating the whole of his wages, and discharged from the service, under the hand and seal of the justice, *gratis* (*a*).

When employers reside at a distance from the business, and are occasionally absent for long periods of time, either beyond the seas or at considerable distances, and in such cases entrust their business to the management of agents, the agents may be summoned instead of the masters, and in the same manner specified in the recited acts, and ordered to pay the wages due, but not exceeding 10*l.*; and in default of payment for twenty-one days the amount may be levied by distress and sale of the goods of the master (*b*). Before conviction for absence it must be shown that it was without lawful excuse (*c*).

Written agreements are often entered into by miners for short specified periods. In the northern coal districts these are generally called pit bonds. In a case of this kind, where the agreement stipulated, that when the pit should be "off work," the collier should continue the servant of the owners, subject to their orders, and should perform a full day's work on every working day: it was held, that the owners were not bound either to keep the

(*a*) 4 Geo. 4, c. 34, s. 3.
(*b*) Sect. 4.
(*c*) Rider *v.* Wood, 29 L. J., M. C. 1.

pit at work, or to employ the collier on all reasonable working days (*d*).

An agreement in writing was made between a collier, and an owner on behalf of himself and partners, whereby the collier was to be paid fortnightly wages, to serve the partners exclusively, and not to leave the service without giving twenty-eight days' notice, and not till after its expiration. The partners agreed that the collier should not be discharged without the like notice. It was held, on a conviction under 4 Geo. 4, c. 34, for absence without lawful excuse, that the contract was not void for want of mutuality, as the employers were bound by implication to pay reasonable wages and to find work (*e*).

An infant may enter into a contract of this kind, if it is beneficial to himself. If not beneficial, he may avoid the contract at any time (*f*). The question of benefit seems to be one for the jury, so far as it depends on fact. But if a contract is manifestly not beneficial on the face of it, the Court will adjudge it accordingly. Thus, where a contract stipulated, that, in case the steam-engine should be stopped from accident or any other cause, the master might retain all the wages during that time, it was held, that such a clause was inequitable, and the conviction was quashed (*g*).

It has been decided that all the above provisions extend only to cases where the relation of master and servant really subsists; and that if work is contracted to be done for a sum certain, or if the hours of work are entirely left

(*d*) Williamson *v.* Taylor, 5 Q. B. 175; 1 D. & M. 398; 13 L. J., N. S., Q. B. 81. See Ex parte Bailey, 23 L. J., N. S., M. C. 161.

(*e*) Whittle *v.* Frankland, 2 B. & S. 49; 31 L. J., M. C. 81. See Nowlan *v.* Ablett, 2 C. M. & R. 57.

(*f*) Wood *v.* Fenwick, 10 M. & W. 195; 11 L. J., N. S., M. C. 127.

(*g*) Reg. *v.* James Lord, 12 Q. B. 757; 17 L. J., N. S., M. C. 181. As to parish settlements gained under pit bonds, see R. *v.* Byker, 2 B. & C. 114; R. *v.* St. Helens, Auckland, 4 B. & Ad. 718; R. *v.* Cowpen, 5 Ad. & 333; R. *v.* Walbottle, 9 Q. B. 248; 15 L. J., N. S., M. C. 153.

to the discretion of the contracting party, this relation will not be considered to exist (*h*). But the contract need not be for any specified time (*i*).

II. We may, therefore, proceed to inquire into the remedies in those cases in which the parties do not stand in the strict relation of master and servant.

It is a usual practice in mining districts for the owners of mines to make contracts with their workmen in the following manner:—A certain number of workmen contract to raise ore from the workings for a certain period, for three, six or twelve months. Each miner engages to labour for a certain number of hours in the week, for instance, eight hours a day, and to make his drift in a certain manner, according to a specified height and width. The workman are to be paid a certain sum for every measure of ore raised within the time (*k*). Part of the money due to the workmen is often paid from time to time on account, and a regular settlement takes place at the end of the period or year. Such cases as these, it appears, cannot be considered to be within the preceding provisions, because the distribution of time is left to the discretion of the miners, who also often employ others in their stead.

A legal partnership will be formed by persons entering into such contracts. It has been expressly decided that a partnership may subsist in cases where parties contribute nothing but personal labour (*l*). Such persons will, therefore, become subject to the usual liabilities of partners. If the existence of a partnership can be proved, the act of one will, in general, bind the rest. Thus, the signature of the contract, the receipt of money, and the settlement

(*h*) Hardy *v.* Ryle, 9 Barn. & C. 603; Branwell *v.* Penneck, 7 Barn. & C. 536; Lancaster *v.* Greaves, 9 Barn. & C. 628.

(*i*) Willett *v.* Boole, 1 Cox, Mag. Ca. 195; Taylor *v.* Porter, 31 L. J., M. C. 111.

(*k*) See Bull *v.* Price, 7 Bing. 237; 5 Moo. & P. 2.

(*l*) Peacock *v.* Peacock, 16 Ves. 49; Reid *v.* Hollinshead, 4 Barn. & C. 878; 7 Dow. & R. 444.

of accounts between the employers and the workmen, by any one of the parties, will be binding upon the whole.

If these mining contracts are not to be performed within the space of one year, they must be in writing and signed by the parties intended to be bound. If they are to be performed within the year, they will be exempt from the operation of the Statute of Frauds (*m*).

If they are reduced into writing, no stamp, it is conceived, will be required in cases of mines of uncertain value. The value of the contract will not be measurable; for the value of the mine itself may be temporarily, or at any rate beyond the period embraced by the agreement, destroyed by the events of a day. The workmen may possibly realize nothing. It may be otherwise in cases where the existence and production of the mineral can be depended upon with certainty, though this may be doubted. Agreements for the hire of any ordinary labourer are exempt from duty.

If in cases like these, which may not be considered to be within the preceding provisions, the workmen should refuse to proceed in the proposed work, or should conduct the workings in an improper manner, or contrary to stipulation, the employers may bring an action for breach of contract.

A contract cannot be rescinded by one party so as to receive back money already paid, unless the other party concur in treating the agreement as abandoned *ab initio*, or unless it were part of the original bargain that, in a certain event, this result should take place (*n*).

As a general rule, a contract cannot be altogether rescinded by one of the parties, when both of them cannot be placed in the same position as before the contract was entered into (*o*). A master miner, therefore, cannot resist the payment of wages in respect of what has been already done by the workmen. It has been seen, that he may

(*m*) 29 Car. 2, c. 3, s. 4.
(*n*) Payne *v.* Whale, 7 East, 274.
(*o*) Hunt *v.* Silk, 5 East, 449; Beed *v.* Blandford, 2 Y. & J. 278.

bring an action for breach of contract. This remedy would, however, in general, prove of no service against such persons. But he may refuse to pay the full amount of the demand; and if the workman should bring an action against the employer for the full amount due, the latter will be allowed to plead the insufficiency of the work, and the breach of condition. A sum may be paid into Court, and the damages of the plaintiff may be reduced to that amount; or if the circumstances should seem to warrant such a proceeding, the whole demand may be resisted, and the defendant may deny the right of the plaintiff to any compensation at all. It will make no difference in this respect, even if a specific sum has been agreed upon (*p*). Notice of the nature of the defence should, in such cases, be given to the plaintiff (*q*).

If a workman should persist in working and keeping possession of a mine after the contract has been rescinded or completed, an action of trespass or ejectment may be brought against him.

In a dispute with workmen who were employed in winning and stacking iron stone, an action at law was referred to a mining agent—objections having been made by the defendants to a legal arbitrator. The arbitrator called in an attorney to sit with him. The defendants objected, and withdrew from the reference. The arbitrator made an *ex parte* award, which was set aside (*r*).

If there be no express contract to complete work before the payment of any remuneration, as in the case of shipwrights, the workman may, after he has proceeded with a portion of the work, refuse to continue it unless he is paid for the work performed, and he may recover to that ex-

(*p*) Duncan *v.* Blundell, 3 Stark. R. 6; Basten *v.* Butter, 7 East, 479; Germaine *v.* Burton, 3 Stark. R. 32; Havelock *v.* Geddes, 10 East, 564; Wilbeam *v.* Ashton, 1 Camp. 78; Bragg *v.* Cole, 6 Moor. 114; Pordage *v.* Cole, 1 Saund. 320.

(*q*) Basten *v.* Butter, Germaine *v.* Burton, supra.

(*r*) Proctor *v.* Williamson, 3 Com. B. (N. S.) 386; 29 L. J., C. P. 157.

tent (*s*). But it has been held, that, by the express and uniform custom of any particular trade, no payment can be compelled unless the work is completed (*t*).

Special provisions have been made with respect to workmen employed in coal and iron works.

Any persons entering into any bargain or contract in writing, for raising or getting any coal, culm, iron stone or iron ore, and wilfully working the same in a different manner to their stipulations, and contrary to the will of the owner or his agents having the care thereof, or desisting or refusing to fulfil their engagements, and convicted, either by confession or evidence, before one or more justices, shall forfeit a sum not exceeding forty shillings, with the costs of conviction, and in default of payment may be committed to gaol for not more than six months; and upon such conviction every such bargain or contract will become void (*u*).

The owners and lessees of coal, iron stone and iron ore, when contracting to get the minerals raised by weight, are often under the necessity of advancing money to the miners upon the measure of the heaps worked, before they are weighed. Great frauds were practised by the miners, who obtained more money than they had earned and conveyed iron stone from one heap to another, and it has, therefore, been enacted, that if any persons shall wall or stack any coal, iron stone or iron ore in any false or fraudulent manner, with an intent to deceive their employers, or shall remove any iron stone or iron ore, with intent to defraud the persons who have raised it, may be convicted before one justice, and committed by him to the house of correction or gaol for not more than three months (*x*).

The provisions contained in the above two paragraphs have no reference to any other minerals than coal and

(*s*) Roberts *v.* Havelock, 3 Barn. & Ad. 404.

(*t*) Gillett *v.* Mawman, 1 Taunt. 137. See Bannister *v.* Bannister, 9 Car. & P. 743, as to *butty* colliers.

(*u*) 39 & 40 Geo. 3, c. 77, s. 3.

(*x*) Sect. 4.

iron, and the removal from any heap, by any persons, with intent to defraud the labourers only, is only punishable in cases of iron stone or iron ore (*y*).

The offence of taking ores and other minerals from the heaps of the workmen, for the purpose of enabling the wrong-doers to gain more wages than are justly due to them, is now provided for by an act relating to the Stannaries (*z*).

III. It is enacted by a recent statute, commonly called the Truck Act, that all contracts for the hiring of any *artificer* in any of the trades following, viz., in the making, casting, converting or *manufacturing of iron* or steel, or any parts, branches or processes thereof, or in the working or getting of any mines of *coal, iron stone, limestone, salt rock*, or in the working or getting of *stone, slate* or *clay*, or in the making or preparing of salt, bricks, tiles or *quarries*, and in various other trades particularly mentioned, or for the *performance*, by any artificer, *of any labour* in any of the said trades, the wages of such artificer shall be made payable in the current coin of the realm only; and any contract making the wages payable, and all payments, in any other manner shall be void (*a*).

Any contract, containing any provision with respect to the place where, or the manner in which, or the person or persons with whom, any part of the wages shall be laid out or expended, shall be void (*b*).

The act contains various provisions with respect to the recovery of wages not paid in the current coin, but it is declared not to invalidate the payment of wages in bank notes or orders payable on demand within fifteen miles (*c*).

Penalties may be recovered from employers entering into such illegal contracts (*d*).

Certain exceptions are made with respect to deductions for mining materials and tools, fuel, medical attendance,

(*y*) See R. *v.* Webb, 1 Moo. C. C. 431.
(*z*) 2 & 3 Vict. c. 58, s. 10.
(*a*) 1 & 2 Will. 4, c. 37, ss. 1, 19, 3.
(*b*) Sect. 2.
(*c*) Sect. 8.
(*d*) Sects. 9 to 12.

hay, corn or provender, rent; but such deductions are not to exceed the real value, and the agreements for them must be signed by the workmen (*d*). The materials supplied to a miner must be by way of sale, and not under a mere contract for hiring (*e*).

A person employed in loading iron stone at a certain rate per ton, who was not bound to give his own labour, and who employed others chiefly, working himself occasionally, was held not to be within the act (*f*).

Two or more working colliers, who join together, and enter into agreements with their employers to get coal or iron stone from certain pits, at a certain rate per ton or per yard, are called butty colliers. They are bound to work themselves; but they also often employ other men to increase the quantity raised, for whose wages they are responsible. In a case of this kind, where no particular quantity was agreed to be worked in any specified time, and several additional men were employed, the butty colliers were held to be *artificers* within the meaning of the act (*g*).

But this decision has been overruled in a case in the Exchequer Chamber. A labourer had contracted to make bricks for a railway, at a certain rate per thousand, and was not bound to give his personal labour. He worked himself, and employed others. It was held, that the payment could not strictly be termed *wages*, and that the original contractor was not within the act (*h*).

The same rule has since been directly applied to the case of butty colliers, who were bound to give personal labour, and who were declared not to be artificers within the meaning of the act (*i*).

The persons employed by colliers, as drawers, who may

(*d*) 1 & 2 Will. 4, c. 37, s. 23.

(*e*) Cutts *v.* Ward, 36 L. J., Q. B. 161.

(*f*) Sharman *v.* Sandars, 22 L. J., N. S., C. P. 86; 13 C. B. 166; Archer *v.* James, 1 Cox, Mag. Ca. 2.

(*g*) Bowers *v.* Lovekin, 6 El. & B. 584; 25 L. J., Q. B. 371. See also Weaver *v.* Floyd, 21 L. J., Q. B. 151 (also overruled).

(*h*) Ingram *v.* Barnes, 7 El. & B. 115, 132; 26 L. J., Q. B. 319.

(*i*) Sleeman *v.* Barrett, 2 Hurl. & C. 934; 33 L. J., Exch. 153.

be discharged by the manager, but who receive their wages from the colliers, cannot claim wages from the owner, on his bankruptcy, under the bankrupt law (*j*).

This act will, of course, only apply to those mines particularly enumerated in it, but it would seem to apply to all quarries, and also to all descriptions of workmen, without reference to their being servants merely.

If any person shall by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavour to force any workman employed in any manufacture, trade or business to depart from his work, or prevent or endeavour to prevent any workman, not being hired or employed, from hiring himself or accepting employment, or if any person shall, in a similar manner, do violence to, or threaten or obstruct another for inducing such person to belong to any club or association, or to contribute to any common fund, or to pay any fine or penalty, or on account of his not belonging to any particular club or association, or not having contributed, or having refused to contribute to any common fund, or to pay any fine or penalty, or on account of his not having complied, or his refusing to comply with any rules, orders, resolutions or regulations made to obtain an advance, or to reduce the rate of wages, or to lessen or alter the hours of working, or to decrease or alter the quantity of work, or to regulate the mode of carrying on any manufacture, *trade or business;* or if any person shall in a similar manner force, or endeavour to force, any manufacturer or person carrying on any trade or business to make any alteration in his mode of regulating, managing, conducting or carrying on the same, or to limit the number of the workmen or servants; every person so offending, being convicted thereof, shall be imprisoned, with or without hard labour, for any term not exceeding three calendar months (*k*).

(*j*) 12 & 13 Vict. c. 106, s. 169. (*k*) 6 Geo. 4, c. 129, s. 3. See

The act does not extend to any meetings, either by masters or workmen, for the purpose of consulting upon and determining the rate of wages or prices, or the hours of employment, or to entering upon any verbal or written agreements for these purposes (*l*).

All offenders may be compelled to give evidence, and will be indemnified from the consequences; and the requisite proceedings under the act are particularly pointed out.

By another statute, any person convicted of any assault, committed in pursuance of any conspiracy to raise the rate of wages, may be sentenced by the Court to be imprisoned, with or without hard labour, for any term not exceeding two years, and may (if it shall think fit) be fined, and required to find securities for keeping the peace (*m*).

By 22 Vict. c. 34, no agreement between workmen or other persons for fixing the rate of wages, or for endeavouring peaceably and in a reasonable manner, and without threat or intimidation, direct or indirect, to persuade others to cease or abstain from work, in order to obtain the rate of wages, or any altered hours of labour, shall be liable to prosecution or indictment for conspiracy. But the enactment shall not authorize any breach of contract, or any attempt to induce any workman to break his contract.

By 24 & 25 Vict. c. 100, s. 41, any assault committed in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or respecting any trade, business, or manufacture, or any person concerned or employed therein, is a misdemeanor, punishable by imprisonment for not more than two years, with or without hard labour.

Regina *v.* Rowlands, 17 Q. B. 671; 21 L. J. M. C. 81; 2 Dear. C. C. R. 364; Walsby *v.* Autrey, 30 Ibid. 122; Ex parte Perham, 29 Ibid. 33; Reg. *v.* Bykerdike, 5 H. & N. 30; 1 Moo. & R. 179.

(*l*) 6 Geo. 4, c. 129, s. 4.

(*m*) 9 Geo. 4, c. 31, s. 25.

A combination on the part of employers, formed for counteracting unions on the part of workmen, is not illegal. But if the object is sought to be carried out by means opposed to public policy, any bond or agreement for such purposes will be invalid. Thus, a bond recited various evils arising from certain combinations of workmen, and their disastrous consequences as well to property as to the rights of the labourers themselves, and then contained several undertakings with respect to the amount of wages, the hours of work, and general discipline and management, in conformity to law, and to the resolutions of a majority of employers convened from time to time. It was held by the Court of Queen's Bench, after a difference of opinion, that the bond was illegal, as being in restraint of trade and of the free action of individuals (*n*).

V. A workman employed in any dangerous occupation takes it with all ordinary risks. The master is bound to provide for the safety of his workmen, as far as can reasonably be expected, and he must not use any art to conceal dangers, but he is not obliged to take more care of his servant than would be proper for himself. If a workman reasonably apprehends danger from any particular acts, he may decline to do them. If he willingly or wilfully encounters dangers which are known to himself, or which are notorious, the master is not responsible (*o*). Thus, a coal owner will not be liable for accidents from explosions of gas found in the due course of working, or from eruptions of water, if ordinary precautions have been taken by him. But a master is bound to protect his workmen against unnecessary risks in works of danger (*p*).

When an employer interferes personally, it is his duty to see that the tackle and apparatus are secure, and he will

(*n*) Hilton *v.* Eckersley, 24 L. J., N. S., Q. B. 353.

(*o*) Dynen *v.* Leech, 26 L. J., Exch. 221.

(*p*) Bartonshill Coal Company *v.* Reid, infra; Ormond *v.* Holland, E. B. & E. 102.

be liable for want of due care (*q*). But he is not liable for injury, if he has deputed his authority to proper agents or servants, and has provided proper machinery (*r*).

A partner, working with an ordinary workman, is still liable as a master, and all the partners are liable, if the negligence is within the scope of the common partnership (*s*), although the absent partners are ignorant of the negligence (*t*).

An owner, who has notice of insufficient fencing of dangerous machinery, from want of repair or otherwise, is liable for injury to a workman who has used ordinary circumspection (*u*).

The Inspection Acts do not preclude any right of action at common law for special damage (*x*).

An employer is not liable for an injury caused to one workman by the negligence of another. Thus,—a workman was engaged, at the bottom of a pit that was being sunk, in filling a tub with water. The employer had provided proper apparatus, but the workman at the top neglected to use it—and the tub fell down again and injured the workman below. It was held, that he could not sue the employer for the injury (*y*).

A case of this kind was brought from the Scotch Courts to the House of Lords. The owners of a coal pit, near Glasgow, had engaged the plaintiffs as ordinary miners. In being drawn up the shaft, the engineman neglected to stop the cage at the proper time, and they were dashed against machinery at the top, and killed. The owners

(*q*) Roberts *v.* Smith, 2 Hurl. & N. 213; 26 L. J., Exch. 319; Brydon *v.* Stuart, 2 Macq. 34.

(*r*) Bartonshill Coal Company *v.* Reid, infra; see also Brown *v.* The Accrington Cotton Spinning Company; 34 L. J., Exch. 208; 3 Hurl. & C. 511.

(*s*) Ashworth *v.* Stanwix, 30 L. J., Q. B. 183.

(*t*) Mellors *v.* Shaw, 30 Ibid. 333.

(*u*) Holmes *v.* Clarke, 30 L. J., Exch. 135.

(*x*) Couch *v.* Steel, 3 E. & B. 409.

(*y*) Griffiths *v.* Gidlow, 3 Hurl. & N. 648; 27 L. J., Exch. 404.

were held to be liable in the Scotch Courts, but the decision was reversed in the Court of Appeal (*z*).

The rule does not apply, when servants are engaged in different departments (*a*).

The same freedom from liability will arise, when the workmen themselves have induced the accident.

One of the special rules for the direction of the enginemen and banksmen of a colliery provided for the daily use of a test for the rope and tackling. The rule had been neglected for many weeks, with the knowledge of the coal-owner and the miners. The rope was at last injured by an accidental fire in the night—and, next day, several miners were killed. They had been warned by the banksman to examine the rope at the time. It was held, that the negligence of the miners had materially contributed to the accident, and that an action against the owner could not be maintained (*b*).

A coal miner was injured by the fall of a stone from the roof, which had lost its support by the removal of the coal below. The removal of the coal, and the support of the roof by artificial propping, should have proceeded simultaneously. The miner had pointed out the stone as dangerous to an underlooker of the owners, who gave no personal superintendence. But the underlooker, who was also a working miner, took no step to secure safety, and the next day the injury occurred. It was held, in the absence of evidence, that the owners had not

(*z*) Bartonshill Coal Company *v.* Reid, 3 Macq. 295. See also Farwell *v.* The Boston and Worcester Corporation (U.S.), 4 Metcalf, 49; Morgan *v.* The Vale of Neath Railway Company, 35 L. J., Q. B. 23; Paterson *v.* Wallace, 1 Macq. 748.

(*a*) Bartonshill Coal Company *v.* Macguire, 3 Macq. 307; Walter *v.* The South-Eastern Railway Company, 32 L. J., Exch. 209; Potter *v.* Faulkner, 1 Best & S. 800; 31 L. J., Q. B. 30; Warburton *v.* The Great Western Railway Company, 36 L. J., Exch. 9.

(*b*) Senior *v.* Ward, 1 E. & E. 385; 28 L. J., Q. B. 139. See Seymour *v.* Maddox, 16 Q. B. 326; 20 L. J., Q. B. 327; Couch *v.* Steel, 3 Ell. & B. 402; 23 L. J., Q. B. 121; Witherley *v.* The Regent's Canal Company, 12 C. B., N. S. 2.

exercised due care in the selection of the underlooker, or that the mine was not in a proper condition before the miners were sent into it, that they were not answerable for the injury caused by the negligence of the underlooker, who was a fellow-labourer (*c*).

By 9 & 10 Vict. c. 93, whenever death ensues from any wrongful act, neglect or default, the person who would have been liable to an action, if the person injured had not died, is still made liable, although the death might have been caused by an actual felony. Every action must be brought by the executor or administrator of the deceased, and the damages must be divided among the wife, husband, parents and children in such shares as the jury shall direct. The action must be commenced within twelve calendar months from the death. There must have been a reasonable expectation of pecuniary advantage to the surviving relatives, if death had not occurred (*d*).

VI. An agent may contract with his employer, as in cases of trustees, if he has afforded the principal the means of an independent judgment with respect to any transaction, as by the employment of other competent advisers. But he will not be allowed to take any advantage from his relation, and he cannot otherwise divest himself of that relation in any transactions. In one case of this kind, the agent was the lessee of his employer's coal mines, and committed several frauds, particularly in the purchase of other property, and in the working of the coal of other proprietors, by means of outstroke, for his own benefit, and without power for that purpose in the lease. A general account was decreed after a long lapse of time, on

(*c*) Hall *v.* Johnson, 34 L. J., Exch. 222; 3 Hurl. & C. 589.

(*d*) Blake *v.* Midland Railway Company, 18 Q. B. Rep. 93; 21 L. J., Q. B. 233; Paterson *v.* Wallace, 1 Macq. 748; Duckworth *v.* Johnson, 29 L. J., Exch. 25; 4 Hurl. & N. 653.

the ground that a plaintiff, so placed, is not liable to the ordinary imputation of negligence in not establishing his claims sooner. But interest was only allowed from the time of filing the bill, chiefly on the ground of acquiescence (*e*).

It was covenanted in a lease, that the lessor might employ a fit person for weighing the coals, and that his wages should be paid by the lessees, but that if the person should not duly attend, and duly keep the accounts, the lessees might discharge him. An action was brought against the lessees on the covenant, who pleaded that the person was not a fit person, and gained a verdict. It was held, in the Court above, that the lessor was not entitled to judgment, notwithstanding verdict, as the appointment of a fit person was a condition precedent to the liability to pay his wages (*f*).

(*e*) Beaumont *v.* Boultbee, 5 Ves. 485; 7 Ves. 599; 11 Ves. 358.

(*f*) Lawton *v.* Sutton, 9 M. & W. 795; 11 L. J., N. S., Exch. 314. See Armitage *v.* Insole, 19 L. J., N. S., Q. B. 202.

CHAPTER XIV.

STATUTORY REGULATION AND INSPECTION OF MINES.

SEVERAL statutes have been passed on these subjects, which may be briefly noticed.

Acts have been passed to prohibit the employment of women and girls in mines and collieries, and to regulate the employment of boys. It is enacted by 5 & 6 Vict. c. 99, amended by 23 & 24 Vict. c. 151, that no females may be employed within any mine after the first day of March, 1843. No male under twelve years may be employed, subject to exceptions, viz. :—a boy above ten years and under twelve years may be employed, if the mine owner shall obtain a certificate from a competent schoolmaster that the boy is able to read and write, *or*, that he has attended school for not less than three hours a day for two days in each week during every lunar month immediately preceding, exclusive of Sunday attendance. The certificates are to be filed by the owner, and produced to any inspector under the acts, or to any inspector of coal mines and ironstone mines. Every person giving a false certificate is made subject to penalties. Inspectors may be appointed. No person under ten years can be apprenticed, and no apprenticeship can be for more than eight years. Exception is made in favour of masons, joiners, engine-wrights, and other mechanics whose services may be required *occasionally* below. The acts do not affect mining works above ground. When a mine is entered by a vertical shaft or pit, or inclined plane, or when there is any internal communication of that kind, no owner shall allow the care of any steam or other engine, windlass or gin, however worked, or any part of the appa-

ratus, to be committed to any other than a male of eighteen years or upwards.

By the first act, it is also prohibited to pay the wages or sums for services due to any persons employed *in or about* any mines or collieries at any tavern or public-house or any place belonging thereto; and all such payments are declared to be void (*a*).

Agents may be punished for offences against the acts, when the owner is ignorant of the offence.

The acts provide for the recovery of penalties and for imprisonment on nonpayment. An appeal is given to the Quarter Sessions, but convictions cannot be removed by certiorari.

The inspection of mines is now regulated by 23 & 24 Vict. c. 151, which repeals 18 & 19 Vict. c. 108. The inspection extends to all *coal mines and collieries*, and *mines of ironstone of the coal measures, and worked in connection with coal or with any disused or exhausted coal mines.* The inspectors are appointed and removable by a secretary of state. No land agent, or manager, viewer, or agent, or mining engineer, or valuer of mines, or arbitrator in any dispute arising between mine owners, nor any person otherwise employed in any mine, shall act as an inspector.

The following general rules are to be observed by all owners and agents:—

> 1. An adequate amount of ventilation shall be constantly produced in all coal mines and collieries and ironstone mines, to dilute and render harmless noxious gases, to such an extent, that the working-places of the pits, levels, and workings of every such colliery and mine, and the travelling roads to and from such working-places shall, under ordinary circumstances, be in a fit state for working and passing therein: (*b*)
>
> 2. All entrances to any place not in actual course of working and

(*a*) 5 & 6 Vict. c. 99, ss. 10, 11.

(*b*) See Knowles *v.* Dickinson, 2 E. & E. 705; 29 L. J., M. C. 135, as to ventilation from Saturday to Monday, under the repealed act.

extension, and suspected to contain dangerous gas of any kind, shall be properly fenced off so as to prevent access thereto:

3. Whenever safety lamps are required to be used, they shall be first examined and securely locked by a person or persons duly authorized for that purpose:

4. Every shaft or pit which is out of use, or used only as an air pit, shall be securely fenced:

5. Every working or pumping pit or shaft shall be properly fenced when operations shall have ceased or been suspended:

6. Every working and pumping pit or shaft, where the natural strata, under ordinary circumstances, are not safe, shall be securely cased or lined, or made otherwise secure:

7. Every working pit or shaft shall be provided with some proper means of communicating distinct and definite signals from the bottom of the shaft to the surface, and from the surface to the bottom of the shaft:

8. All underground self-acting and engine planes on which persons travel are to be provided with some proper means of signalling between the stopping places and the ends of the planes, and with sufficient places of refuge at the sides of such planes, at intervals of not more than twenty yards:

9. A sufficient cover overhead shall be used when lowering or raising persons in every working pit or shaft, where required by the inspectors:

10. No single-linked chain shall be used for lowering or raising persons in any working pit or shaft, except the short coupling chain attached to the cage or load:

11. Flanges or horns of sufficient length or diameter shall be attached to the drum of every machine used for lowering or raising persons:

12. A proper indicator to show the position of the load in the pit or shaft, and also an adequate break, shall be attached to every machine, worked by steam or water power used for lowering or raising persons:

13. Every steam boiler shall be provided with a proper steam-gauge, water-gauge, and safety valve:

14. The fly wheel of every engine shall be securely fenced:

15. Sufficient bore holes shall be kept in advance, and, if necessary, on both sides, to prevent inundations in every working approaching a place likely to contain a dangerous accumulation of water.

Besides these rules, every mine shall have such special rules for the guidance of the managers, and the persons employed, as are best calculated to prevent dangerous accidents. The special rules in use are confirmed. In other cases, the rules shall be framed by the owner, trans-

mitted to the state office, and, if not there objected to within forty days, shall be established. Before transmission, the special rules are to be hung up, painted or printed on a board, in the principal office, and at the place where the workmen are paid. They are also to be framed and transmitted within three months from commencement of act, or of working. If the secretary of state deems the rules insufficient, he may, within the forty days, propose alterations or additions, and if the owner shall not object to them within twenty days, the rules shall be established with them. If he should so object, he may, within fourteen days, nominate five or more disinterested mining engineers or other competent persons of experience, of whom the secretary shall appoint *one or more*, to determine the difference, and to decide the special rules. If the owner shall not so nominate, one such arbitrator shall be appointed by the owner and another by the district inspector—and the two arbitrators, before entering into the matters, shall appoint a third, as umpire in case of difference. If they refuse or neglect to appoint an umpire for seven days, the chairman of Quarter Sessions, in England, and the sheriff, in Scotland, may appoint the umpire. The decision of the arbitrators and umpire, or any two of them, is final. Provision is made for the death, incapacity, or refusal or neglect to act, of any arbitrator, and for the non-appointment of an arbitrator by the owner.

After the special rules are established, the owner or the secretary of state, may propose amendments, subject to the same process of approval as the original rules.

The general as well as the special rules shall be hung up on a board in the manner before mentioned.

Any inspector may enter into the mines and works at all reasonable times, by day or night, but so as not to impede the working, and to examine the state of the mines, works, and machinery, and as to ventilation, the mode of lighting and using lights, and all matters relating

to the safety of the miners, and the observance of the act. The owners are required to furnish the means of entry and inspection. If the inspector find any mine, or the works, or machinery, or matter or practice, to be dangerous or defective, so as to threaten bodily injury, he must give notice in writing to that owner or agent of the particular grounds of his opinion, and report them to the secretary of state. Any difference shall be determined by arbitration, as above described—but with penalties on the owner, if the danger or defect be not forthwith removed or remedied, or if he fails to proceed with the nomination of arbitrators, or if he neglect to obey the award.

The owner or agent must, on inspection, produce accurate plans of the workings of the mine; and in case of nonproduction of the plans, or the withholding of any part, or of the concealment of any parts of the workings from inspection, or of imperfection or inaccuracy of the plans, the inspector may require an accurate plan of the actual workings to be made within a reasonable time, at the costs of the owners, on a scale of not less than two chains to one inch, or on the actual working scale of the colliery, in which the workings shall be brought up to within six months of the time of inspection, and the owner or agent may be required to mark the progress of the workings up to that time. But the inspector is not authorized to make a copy of any plan so produced or made.

In case of loss of life or any personal injury by explosion, or any other accident (*c*), the owner or agent must, within twenty-four hours, send notice of it, under his hand, to the secretary of state, in England, and to the lord advocate, in Scotland, and in all cases to the district inspector, specifying the probable cause of the accident.

(*c*) See Underhill *v.* Longridge, 29 L. J., M. C. 65, as to omission of words in former act.

The notice may be sent in each case by post. Every coroner on any inquest shall, in the absence of the inspector or of any person attending on behalf of the secretary of state, adjourn the inquest, and, by letter, sent four days at least before any adjourned inquest, by post, addressed to the inspector, give notice to him of the place and time of holding it. The body may be identified and interred. If the accident has not occasioned more than one death, and notice of the inquest has been sent, by post, by the coroner to the inspector, not less than forty-eight hours previously, the inquest need not be adjourned, if a majority of the jury think it unnecessary. The inspector may examine any witness at the inquest, subject to the order of the coroner.

When any mine is abandoned, or its working discontinued, or recommenced after abandonment or discontinuance for two months or more, or when any working is commenced for opening a new mine, the owner must give notice thereof to the inspector, by post, within two months. In cases of abandonment or discontinuance, the owners must cause the workings to be securely fenced, for the prevention of accidents.

The act is enforced by penalties. No owner of the mine in question, nor his father, son, brother, or agent, can act as a justice of the peace in any cases of dispute between persons employed and their employers.

A copy of the special rules, certified under the hand of any inspector, shall be received as evidence.

Every inspector, on or before the first of March in every year, shall make a separate and distinct report in writing, of his proceedings during the preceding year, and shall transmit it to a secretary of state, and a copy shall be laid before both Houses of Parliament.

The wages of all persons employed in mines within the act shall be paid by the immediate employer in money, at an office appointed for that purpose in the special rules—and such office shall not be contiguous to any house where

spirits, wine, beer, or other spirituous liquors are sold, under a penalty not exceeding 10*l.*

When the persons employed are paid by the weight, measure, or gauge of the coal, ironstone, or other material, they are empowered, at their own cost, to station one of the employed persons at the place for weighing, measuring, or gauging, to take an account thereof,—but without authority to impede the working of the mine, or to interfere with the weighing, measuring, or gauging.

The act does not extend to Ireland.

When there are several joint owners of a mine, proceedings may be taken against one owner only (*d*).

An act has been passed to amend the law relating to coal mines—25 & 26 Vict. c. 79. It is, in fact, an act for amending the Inspection Act, and it applies to the same mines only as are comprised in that act.

All mine owners are forbidden, after 1st of January, 1865, to employ any persons in the mines, unless there are in communication with every seam at work for the time being at least two shafts or outlets, separated by natural strata of not less than ten feet in breadth, by which shafts or outlets distinct means of ingress and egress may be available. But the two shafts or outlets need not belong to the same mine, if there be the same available means of ingress and egress. The enactment is not to apply to opening a new mine for searching or proving minerals, nor to any working for making a communication between two or more shafts, so long as not more than twenty persons are employed at any one time in the new mine or working.

If an owner of any mine then existing and in work shall object in writing, addressed to any secretary of state, that by reason of the nature of the mine, or from its being nearly exhausted, or from any other special cause, he ought to be exempted from providing an additional shaft

(*d*) Reg. *v.* Brown, 7 E. & B. 757; 26 L. J., M. C. 183.

or outlet, or that he cannot comply with the act within the time, a reference will be made to arbitration. If its result is in favour of the owner, he shall be relieved from such obligation, or have such an extension of time for making an additional shaft or outlet as may be awarded. If the result be against him, or if no award be made by reason of any default or neglect on his part, he will be bound to comply with the provisions of the act. Arbitrations are to be conducted according to the 13th section of the former act. No objection by the owner can be entertained, unless it be made within six calendar months after the passing of the act, in a claim of exemption, and within the same period preceding the 1st of January, 1865, in a claim for extension of time.

An injunction may be granted by any of the superior courts of law or equity, on the application of the attorney-general, for prohibiting the working of any mine in contravention of the act.

No agreement made before the passing of the act shall be allowed to prevail against any owner during such acts as may be necessary for providing an additional shaft or outlet.

CHAPTER XV.

THE COAL TRADE.

VARIOUS legislative measures have been adopted upon this subject, and it may be proper to give some account of those now in operation.

All keels, boats, waggons, wains, carts, and other carriages, used for the conveying of coals in any of the ports, may be admeasured by commissioners appointed for the purpose; and if the marks made by them shall be removed or altered, every person privy to the doing of it is liable, on conviction before a justice, to a penalty of ten pounds (*a*).

All the above articles are to be re-admeasured and marked, if the marks have been defaced by repairs or otherwise, under the penalty of the forfeiture thereof, and of the coals in them. And any person wilfully defacing the marks is liable to a penalty of not more than five pounds, nor less than forty shillings (*b*).

By Statute 17 Geo. 2, c. 35, s. 1, any three justices of the peace of the several counties in England and Wales and Berwick-upon-Tweed, are empowered to set the rates and prices of all coals brought by sea to all places, except into the river Thames, and sold by retail, allowing a competent profit to the retailer, beyond the price paid by him to the importer, and the ordinary charges. If any engrosser or retailer of such coals shall refuse so to sell, the justices may empower persons to enter into any wharf or store place, and cause the coals to be sold at the rates fixed,

(*a*) 30 Cha. 2, st. 1, c. 8; 6 & 7 W. 3, c. 10; 11 Geo. 2, c. 15; 15 Geo. 3, c. 27.

(*b*) 31 Geo. 3, c. 36, ss. 1, 4.

rendering the amount to the owner after deducting the necessary charges. If an action be brought against any such justice or person, the defendant may plead the general issue; and if the verdict be found for him, or in case of a nonsuit, he may recover damages and treble costs of suit. But no person interested in any wharf for the sale of coals, or trading in coals, not for his own private use, shall be concerned in setting the price (*c*).

By Statute 52 Geo. 3, c. 9, s. 6, all ships in the coal trade must be measured, and the duties paid on the greatest quantity of coals, culm or cinders which it shall appear that any such ship is capable of containing.

By Statute 5 & 6 Will. 4, c. 63, s. 9, it was enacted, that all coals, slack, culm and cannel of every description should be sold by weight, and not by measure, under a penalty upon the seller of forty shillings for every sale by measure.

In 1836, an act was passed for repealing many provisions respecting the coal trade. Great anxiety had been, at various times, shown by the legislature in preventing any improper advance in the price of coals. With this view, it had been enacted by Statute 9 Anne, c. 28, that all agreements between persons engaged in the coal trade for restraining any persons from freely selling their coals should be illegal, and penalties of various amounts were imposed upon persons offending against this provision. In 1730, another act was passed, 4 Geo. 2, c. 30, declaring it illegal for the owners or masters of any vessel engaged in the trade, to keep turn in the delivery of their coals in the river Thames, and also imposing penalties upon the offenders. In 1787, another act was passed, 28 Geo. 3, c. 53, by which, with the appearance of indemnifying persons who might have incurred penalties under the former acts, it was enacted, that any number of persons united in covenants or partnerships, consisting of more

(*c*) 17 Geo. 2, c. 35, ss. 1, 2.

than five persons, for purchasing coals for sale, or for making regulations in carrying on the trade, should be deemed unlawful combinations to advance the price of coals, and persons concerned in them were made liable to be punished by indictment or information. It was considered, however, that these provisions interfered with the free and open trade in coals, and prevented the employment of large joint capital in the trade, and that they proved quite inadequate to meet the purposes contemplated by the legislature. They were, therefore, all repealed by the 6 & 7 Will. 4, c. 109.

In 1831, an important act was passed for regulating the vend and delivery of coals in London and within twenty-five miles from the General Post Office (*d*). After repealing a great many former provisions, it is declared, that the Coal Exchange shall be vested in the mayor, commonalty and citizens of the city of London for the purposes of the act, and shall be an open and public market for the sale of coals (*e*).

The act then provides for the appointment of clerks and officers by the common council of London, and, if necessary, for the removal and enlargement of the market place (*f*). A duty of one penny per ton upon coals, culm and cinders in every ship coming westward of Gravesend, may be demanded from every master, for defraying the necessary expenses which may be incurred in the execution of the act, which duty is to cease as often as provision has been made for defraying the current expenses (*g*).

The Court of Lord Mayor and Aldermen may make and alter bye-laws for the management of the market, and all things belonging to it, and fix penalties not exceeding 5*l.*, for the breach of any such laws. These laws are to be approved of by the Lord Chancellor or one or more of the Judges of the Courts of Common Law, and they cannot

(*d*) 1 & 2 Will. 4, c. 76, amended by 1 & 2 Vict. c. 101, and 14 & 15 Vict. c. 146 (local).

(*e*) Sects. 3, 4.

(*f*) Sects. 5 to 22.

(*g*) Sects. 23, 24.

be approved of unless seven days' previous notice in the Gazette has been given of the intention to make, alter or repeal any such rules. All bye-laws are also to be printed and made public (*h*).

All coal, cinders and culm are directed to be sold by weight, and not by measure (*i*).

Any person knowingly selling one sort of coals for a sort which they are not, shall forfeit 10*l.* per ton, but not beyond twenty-five tons (*k*).

Various other provisions are then made with respect to the mode of sale and delivery of coals within the limits prescribed by the act, and the duties payable to the city of London (*l*).

The right of the corporation of London, by prescription, under the charters of James I, as conservators of the river Thames, to measure or weigh any coals, was directed not to be exercised for seven years from the 31st day of December, 1831. A duty of one shilling per ton was imposed upon coals, cinders and culm brought into the port of London, in lieu of the former duties of fourpence and sixpence, payable under the Statute 5 & 6 Will. & Mary, c. 10. But the rights of the corporation were to be revived after the period of seven years, or on the above duty ceasing to be paid.

During the seven years and the payment of the duty, the corporation was not to receive the water baillage and groundage in respect of coals and coal vessels, or any sums for permits and for registering certificates, but subject to be claimed afterwards (*m*).

Every fitter or seller of coals for the port of London is required to send, in a letter directed to the clerk of the coal market, and put into the General Post Office on the

(*h*) 1 & 2 Will. 4, c. 76, ss. 32 to 34.

(*i*) Sects. 43, 44.

(*k*) Sect. 45. See Butterfield *v.* Windle, 4 East, 385.

(*l*) See the Act; and see Little *v.* Poole, 9 Barn. & C. 192; Brown *v.* Duncan, 10 Barn. & C. 93, in explanation of the old law.

(*m*) Sects. 62, 63.

day of sailing, or to give to the master of the vessel, a certificate signed by the fitter, containing the day of the month and year of loading, the names of the master and ship, the quantity of tons, the name of the collieries from which the coals are wrought, and the price paid by the master for every sort of coals shipped; and, in case of refusal or neglect, or giving a false certificate, the offender will be liable to a penalty of 100*l.* If the certificate is given to the master, it must be delivered by him at the office of the clerk of the coal market within twenty-four hours after the arrival of the vessel in the port of London, subject to the like penalty. If the fitter's certificate be lost, or if the vessel should change her destination, and arrive without a certificate, the master is required within twenty-four hours after arrival to make a declaration to the like effect, and also accounting for the loss of the certificate, or the change of destination, under a like penalty (*n*).

Monthly returns are to be made by the fitters or other sellers of the seaborne coal, verifying the certificates. Similar regulations are made as to coals sent to the London district by inland navigation. A collector of duties may be appointed. All railway companies bringing coals to the London district are to make weekly returns to the clerk of the coal market, and to pay the duties within seven days, with similar provisions for verifying the returns. Canal companies are to make monthly returns. Inspectors of coal traffic may be appointed. Boundary stones or marks may be erected on the line of every canal, railway or turnpike road, at the distance of twenty miles from the General Post Office, which are to define the limits of the district liable to duties. The clerk of the coal market may require the coals to be weighed, and there are provisions for defect or excess of weight. Drawbacks of twelve pence per ton are allowed for coals

(*n*) As amended by 14 & 15 Vict. c. 146 (local).

consumed by railway engines beyond the district, and for seaborne and other coals taken by ships or inland navigation or railway beyond the district of twenty miles. All coal brought by railway or canal within the district, and carried out of it, without being unloaden or bulk broken, is exempted from duty. The corporation of London have a discretion in allowing a drawback of twelve pence per ton on all quantities of coke above twenty tons manufactured within the limits, and carried out. Monthly returns of all claims for drawback are required. Any lighterman not delivering the whole of the coals is liable to a penalty of 100*l*. The other provisions are also enforced by penalties. Coals are to include coke or cinders and culm (*o*).

The above act was amended and continued for seven years by 1 & 2 Vict. c. 101 (local). New provisions are made with respect to the seller's ticket to be sent with the coals delivered, the weighing machines sent with each cart, and the payment of wages. The corporation of London are empowered to make bye-laws for regulating vessels laden with coal, subject to the sanction of the Board of Trade.

Both these acts were continued to the 5th July, 1862, and the duties were extended to coals brought to London by railways (*p*).

By another act, 24 & 25 Vict. c. 42, the coal duties are continued to the 5th July, 1872. The London district is to consist of the Metropolitan Police District, and includes the cities of London and Westminster. The boundary stones or marks are to be erected accordingly. The same drawbacks are to be allowed, with power to dispense with or vary any of the required forms.

(*o*) As amended by 14 & 15 Vict. c. 146 (local).

(*p*) 8 & 9 Vict. c. 101.

The coals are directed to be weighed by weighing each sack "with the coals therein, and afterwards to weigh, in like manner, each sack without any coals therein." This provision is not satisfied by putting each sack of coals in one scale, against weights equal to the weight each sack should contain, and an empty sack in the other scale (*q*).

The seller of coals cannot maintain an action for the price, if he has not complied with the provisions of the acts, as in the nondelivery of the ticket before unloading (*r*).

When some of the sacks at one delivery under one contract are deficient, one aggregate penalty only is incurred, calculated at the rate of each sack, and not separate penalties. An action of debt is, therefore, maintainable, instead of a proceeding before justices, which is limited to 25*l.* (*s*).

The delivery of coals to a purchaser directly out of the seller's coal brig at the purchaser's wharf is not such a delivery as to be within the meaning of the words "any lighter, *vessel*, barge or other craft," and therefore does not require a ticket to be given. The meaning of the word "*vessel*" is limited by the words "*other craft*" (*t*).

Under this act, patent fuel, a composition of coal dust, tar and lime, containing 92 per cent. of coal, was held not to be liable to duty, as coal (*u*).

The production of an entry of a contract, purporting to be signed by the buyer and factor, is not evidence of the sale in an action brought for the price of the coals, unless the buyer be proved *aliunde* to have signed the contract (*x*).

(*q*) Meredith *v.* Holman, 16 M. & W. 798.

(*r*) Cundell *v.* Dawson, 4 Com. B. 376.

(*s*) Collins *v.* Hopwood, 15 M. & W. 459; 16 L. J., N. S., Exch. 124. See Reeve *v.* Poole, 4 B. & C. 155.

(*t*) Blanford *v.* Morrison, 15 Q. B. 724; 19 L. J., N. S., Q. B. 533.

(*u*) Mayor and Corporation of London *v.* Parkinson, 10 C. B. 228; 4 New Mag. Ca. 153.

(*x*) Brown *v.* Capel, M. & M. 374.

In an action of debt, *qui tam*, for selling coals contrary to law, it was held, that the contract upon which the penalty arises must be truly stated, and any variance is fatal, and, therefore, that a contract stated to be with two persons, when it was with two and another, was a fatal variance, though the declaration stated the exact quantity which the two were to have (*y*).

If an agent employed to sell coals make a bargain in his own name with a tradesman to furnish him with coals on credit, for which, in return, he is to receive goods, on credit, and both the coals and goods are delivered, the real seller of the coals may recover the price from the tradesman, if his name be in the ticket sent with the coals as seller, because the tradesman after that is bound to inquire into the nature of the agent's situation, and should not continue to treat him as a principal (*z*). If several persons in a club join to buy a quantity of coals, and afterwards subdivide their shares, and the coals are delivered to each short of measure, each person cannot maintain an action for the penalty against the seller, for the contract of sale is joint (*a*).

Coals sent from Newcastle to London are liable to a port duty according to the Newcastle chaldron (*b*).

A local act directed to be paid to commissioners any rate or duty they should think fit to order, not exceeding the sum of three shillings, for every chaldron of coals brought into a town. It was held, that a duty was payable in respect of each quantity of coals amounting to a chaldron, although brought at different times and in several parcels, each containing a less quantity than a chaldron (*c*).

(*y*) Parish *v.* Barwood, 5 Esp. 33.

(*z*) Pratt *v.* Willey, 2 Car. & P. 350.

(*a*) Everett *v.* Tindal, 5 Esp. 169.

(*b*) Linskill *v.* Read, Peake's Add. Ca. 68.

(*c*) Mills *v.* Funnell, 2 Barn. & C. 899.

An advertisement stated that certain coals were of a suitable quality for steam vessels, and were adapted for all closed furnace or stove fires, with other properties. The vendor of these coals gave to the purchasers a printed copy of this statement before the sale. The invoice described the coals as "steam coals." The coals proved to be unfit for steam purposes, and the purchasers brought an action for a breach of the conditions contained in the printed statement. But they failed at the trial in proving the statement to be part of the contract. The Court afterwards amended the declaration by substituting, instead of the contract declared on, a statement that the coals were of fit quality for working steam-engines, and generating steam for steam-engines (*d*).

A railway company contracted by deed with another railway company for the transit of coals along the latter railway, for twenty-one years, in consideration of payments which varied according to the quantity of coals carried, and the amount of dividend of the latter company for the time being. It was held, that the payments were "*tolls*," within the meaning of railway acts, and, therefore, that the deed was valid (*e*).

Disputes arise sometimes with respect to undue preference given by railway and canal companies in the carriage of coal and other merchandize.

It is enacted by 17 & 18 Vict. c. 31, s. 2, "that no railway or canal company shall make or give any undue or unreasonable preference or advantage to or in favour

(*d*) The Pacific Steam Navigation Company *v.* Lewis, 16 M. & W. 783; 16 L. J., N. S., Exch. 212.

(*e*) The Great Northern Railway Company *v.* The South Yorkshire Railway Company, 9 Exch. 642; 23 L. J., N. S., Exch. 186.

of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

A writ of injunction will be issued by a Court of Common Law for enforcing this enactment. In the judicial application of this section, consideration will be given to the fair interests of the railway itself, and to such questions as, whether the company might not carry larger quantities, or for longer distances, at lower rates per ton per mile, than smaller quantities, or for shorter distances, so as to realize equal profits. But the Court will not sanction any preference which simply consists in giving an advantage to one competitor over another, and which is not founded on any such beneficial consideration (*f*).

A preference may be given in cases where the cost of carriage is less to the company in one case than in another; but when the object is of a speculative nature, and the pecuniary interests of the company are not shown to be affected, such a preference will not be allowed (*g*).

The threat of a coal owner that, unless he is allowed to have his coals carried at a certain rate, he will construct a railway which will divert his coal altogether from that of the company, will not justify a preference (*h*).

In like manner the promise of a customer that he will use other lines of the company for traffic, which is distinct

(*f*) Ransome *v.* The Eastern Counties Railway Company, 1 Com. B. (N. S.) 437; 26 L. J., C. P. 91; Oxlade *v.* The North-Eastern Railway Company, 1 Com. B. (N. S.) 454; 26 L. J., C. P. 129.

(*g*) Oxlade *v.* The North-Eastern Railway Company, supra.

(*h*) Harris *v.* The Cockermouth and Workington Railway Company, 3 Com. B. (N. S.) 693; 27 L. J., C. P. 129.

from that in question, will not avail to secure a proper preference (*i*).

A similar contract to have all the goods subject to the reduced rates carried by a railway, and not by water or other means, does not form a good consideration for preference—unless it can be clearly shown that the reduction is made to prevent a competition with the railway, or that such an amount of traffic is secured by the arrangement as may compensate for the reduction (*k*).

The adjustment of certain districts to become entitled to reduced rates, the effect of which is to give one dealer an advantage over another by reason of larger extent of custom, is not prohibited by the act. But when the effect is to diminish the natural advantages of the dealers at certain places by reason of proximity, and to abolish part of the cost of carriage to the same places in favour of other dealers, an undue preference will be given (*l*).

A guarantee of large quantities, and full train loads, at regular periods, forms a good consideration for a preference over those who cannot give such a guarantee—if the real object of the company is to secure a greater amount of profit by the diminished cost of carriage (*m*).

The same rule has been applied to the equality clause contained in the Canal Companies Act, 8 & 9 Vict. c. 28 (*n*).

When a reduced rate is established for the carriage of coals in certain quantities to certain districts, the company may carry the coals most conveniently for themselves, and

(*i*) Baxendale *v.* The Great Western Railway Company, 5 Com. B. (N. S.) 309; 28 L. J., C. P. 69. See also 5 Com. B. 336; 28 L. J. C. P. 81.

(*k*) Garton *v.* The Great Western Railway Company, 5 Com. B. (N. S.) 669; 28 L. J., C. P. 158.

(*l*) Ransome *v.* The Eastern Counties Railway Company, 4 Com. B. (N. S.) 135, 159; 27 L. J., C. P. 166.

(*m*) Nicholson *v.* The Great Western Railway Company, 5 Com. B. (N. S.) 366; 28 L. J., C. P. 89.

(*n*) Strick *v.* The Swansea Canal Company, 33 L. J., C. P. 240.

with due regard to their working expenses, without any imputation of preference of one district over another—if the tariff is not infringed (*l*).

The measuring of coals in the counties of Northumland and Durham is regulated by a royal commission, dated 30th August, 1830, addressed to the chief coal owners, viewers and custom officers of the district, in which are contained several specific directions as to the registry of keels, boats, waggons and carriages, their owners, their contents, and the place of their employment; the measuring and marking of them, their alteration according to the principle of keeping a regular proportion to the legal chaldron of fifty-three hundred-weight, and the prevention of frauds; subject also to the further directions of the Board of Treasury or the Board of Customs. The powers of this commission are hardly ever exercised.

Provisions with respect to duties are also contained in several acts relating to the ports of the kingdom.

The coal whippers of the port of London were regulated by 14 & 15 Vict. c. 79. But the act expired in 1856, and has not been renewed.

An act has been passed for repealing several acts of parliament imposing restrictions on the Irish coal trade, and for its regulation (*m*).

Colliers and salters in Scotland were, till recent times, in a state of bondage or slavery (*n*). By an act, which

(*l*) Ransome *v.* The Eastern Counties Railway Company, 8 Com. B. (N. S.) 709; 29 L. J., C. P. 329.

(*m*) 2 Will. 4, c. 21.

(*n*) Redgauntlet, 2nd vol. 314.

recites the reproach of such a state of servitude in a free country, the workmen and their families are declared to be free (*o*). The law relating to the colliers in Scotland is further explained by another statute (*p*).

An act has been passed for the better regulation of the watermen and lightermen of the river Thames (*q*).

By the Newcastle-upon-Tyne Coal Turn Act, special provisions were made for procuring cargoes of coal for ships, in regular turn, in that port (*r*). The act expired in 1866, and its provisions are not intended to be renewed.

(*o*) 15 Geo. 3, c. 28.
(*p*) 39 Geo. 3, c. 56.
(*q*) 7 & 8 Geo. 4, c. 75 (local).
(*r*) 8 & 9 Vict. c. 73 (local).

CHAPTER XVI.

LOCAL CUSTOMS.

I. *In Derbyshire.*
II. *In Cornwall and Devonshire.*
III. *The Forest of Dean.*

Section I.

CUSTOMS IN DERBYSHIRE.

The lead mines of Derbyshire have been worked from the earliest period to which our national records extend.

It would be difficult to trace with accuracy the origin and growth of those peculiar customs, which continue to this day to regulate the operations of the lead adventurer in many parts of this county (*a*). Almost all the old mining codes of Europe, whose provisions are opposed to the rights of the owner of the surface, must have originated in the old Roman law, or in the royal prerogative, or in the successful assertion of high feudal privileges (*b*). In Spain, and in many parts of Germany, the royal right to mines is still preserved in pristine vigour. In such cases, the right exists as a fundamental law of the country (*c*). In our own country, the right of the crown to all mines of silver and gold betrays a similar origin. But the law of England has never sanctioned so general a

(*a*) See Hardy's Miners' Guide, 1748; Mander's Glossary, 1824.

(*b*) See Eichhorn, Deutsche Staats- und Rechtsges. S. 297, note k; 1 Phillips Grunds. des. D. Privatrechts, 225.

(*c*) Commentaries of Gamboa, by Heathfield.

principle. The paramount right of the crown must certainly have extended over all those districts in England which are still governed by peculiar mining laws. But this right, it is presumed, rests, not upon the general exercise of the prerogative, but upon the distinct claims of ownership over the lands now subject to custom. In Russia, which was beyond the pale of the manorial system, all the mines, even those of gold and silver, belong to the landed proprietors. The crown claims the precious metals, in this right, in the crown lands. The ordinary exercise of manorial rights would be sufficient to include the right to mines. Evidence of this may still be seen in private manors in different parts of England. The Stannaries of Cornwall and Devonshire, the customary lead districts of Derbyshire and the Forest of Dean constituted parts of the royal domains; and all subsequent grants of the surface from the crown must be considered to have been made subject to its paramount right to the mines. It was, of course, competent for the crown to have disposed of any royal manor and its mines. If such a disposition took place before the establishment of the customs, the exclusive right to the mines might have passed as part of the grant. But after the mining customs had been fully admitted, all these dispositions by the crown must necessarily have been made subject to the exercise of those customs. These considerations will account both for the exemption of lands in many adjoining manors from the operation of existing customs, and for the existence of those customs in lands no longer in the possession of the crown.

However this may be, it is easy to suppose that these local customs were likely to have an origin not very remote from that of the superior claimants. In those distant times the efforts of the miner were feeble and unskilful. The harvest of the surface might be gathered at little cost, and with slender mechanical means. But the acquisition of the richer treasures below required an intelligence reserved

for more modern times, and it also demanded pecuniary resources which either failed or were diverted into channels more congenial to the spirit of the age. The art and mystery of mining depended, therefore, upon the individual exertions of operatives desirous of gaining the bare means of employment, and not upon those extensive enterprises which have been since demanded by a superior state of civilization. It became expedient, therefore, to afford every encouragement to the labours of the unassisted miner, who shares his profits with the owner; and to this source may safely be assigned all those customs under our present consideration. It is not to be wondered, under such circumstances, that these local codes should in their language and provisions sufficiently display the infancy of mining.

The principal places in Derbyshire which are subject to peculiar customs, are the royal manors called the King's Field, in the High Peak, comprising the liberties of Castleton, Bradwell, Great and Little Hucklow, Winster, Taddington, Monyash and Upper Haddon; and the King's Field, in the wapentake of Wirksworth, in the Low Peak; the private liberties of Ashford, Great and Little Longstone, Monsall-dale, Wardlow, Hassop, Calver, Rowland, Hartington, Peak Forest, Stoney-Middleton, Eyam, Tideswell, Litton, Youlgreave and Crich. The customs in these various districts, as may be supposed, were variable. Those in the High and Low Peaks were formerly inquired into in pursuance of a writ issued and executed in the sixteenth year of Edward the First, and they were more accurately ascertained by inquisitions taken before the Mineral Courts, principally in the seventeenth century, the articles of which are, in general, contained in sufficiently intelligible language. The customs of some of the other manors have also been partially ascertained in a similar manner. But in some manors the customs are entirely oral and traditionary; and, although agreeing in their general spirit with those committed to writing, there

is some difficulty in ascertaining them correctly, and sufficient variation to cause doubt and perplexity.

The manors of the High and Low Peak are not co-extensive with the hundreds of High and Low Peak, and in these hundreds there are several manors not subject to any peculiar customs (*c*).

A much greater uniformity of the customs has now been procured by two recent Acts of Parliament. The first act, 14 & 15 Vict. c. 94, determines in one schedule the customs of that part of the hundred of High Peak, comprising the liberties of Castleton, Bradwell, Hucklow, Winster, Monyash, Taddington and Upper Haddon. The second act, 15 & 16 Vict. c. 163 (local), determines in like manner the customs within the soke and wapentake of Wirksworth in the Low Peak, the private manors of Ashford, Stoney-Middleton and Eyam, Hartington, Litton, Peak Forest, Tideswell and Youlgreave in the High Peak, and of Crich in the Low Peak. Several manors are not affected by these acts, and are still subject to the old customs. The legislative customs of the first act are given in the Appendix. Those of the other act are almost identical—and both are founded closely on the old customs. The customs of the High Peak Act have been further amended by several new articles propounded and sanctioned under a special power in that act, and which are also inserted in the Appendix. There are also alterations in the practice of the courts. The other act does not contain any such new power of legislation. It is declared by both acts, that the customs established by them are entirely to supersede all other customs relating to the same districts—and, as they now embrace almost the whole of the customary country, it may suffice to give a concise account of the customs thus amended.

All the customs are confined to *lead* mines, but they are

(*c*) See Beresford *v.* Bacon, Lutw. 418; Lynn Regis *v.* Taylor, 3 Lev. 160.

extended to all the liege people of the nation, who may enter and search for lead ore in all lands and places within the liberties. Churches, burial grounds, dwelling-houses, highways, orchards and gardens are excepted (*d*).

The first discoverer of a vein is entitled to have assigned to him two meers of ground in it. A meer is a space of ground in a rake vein varying from twenty-seven yards to thirty-two yards in length, and in flat or pipe works, about fourteen square yards. The lord is then entitled to the next meer, which is usually resold to the miner at a valuation, and afterwards the finder, or, if he declines, any other person, is entitled to other meers as they are taken from the lord, and freed. But the lord is only entitled to one meer for the whole vein. Freeing consists in delivering the first dish of ore to the lord. This ceremony is equivalent to a livery of seisin; for without it, there can be no title to the mine; and if thus freed and kept in lawful possession, the mine is declared to be an estate of inheritance, liable to dower, and capable of absolute disposition (*e*). Every adverse claimant must assert his title by action within six months, when the mine is in work.

The quarter cord is a space of ground extending along the sides of the vein, and set out for enabling the miner to place and wash the ore and heap the refuse. In the Low Peak, it was a quarter of a meer in breadth, and it has been often disputed from what point this quarter meer should be measured—from the middle of the vein, or from the nearest sides of the vein. The latter mode was admitted to be correct in the case of Sir Henry Harpur, in a trial at Derby, on the 22nd of March, 1753. By the new acts, the barmaster and two of the grand jury are to lay out a sufficient space. No compensation is payable for the use of this space. Rights of way are also to be

(*d*) See Gilbert *v.* Tomison, 4 D. & R. 222; supra, Chap. XI.

(*e*) See Doe *d.* Thompson *v.* Pearce, Peake's Add. Ca. 242, where this was denied with respect to the Forest of Dean.

provided for the miners, with the same exemption from compensation.

But it is not only necessary to free a meer of ground: it is also requisite that the miner should keep it in lawful possession. In the manors not comprised in the new acts, daily acts of ownership will not alone suffice to effect this. He may retain lawful possession for a few days by simple crosses and holes made in the ground; but the acquisition of a more permanent title must be effected by the erection of stowses. These stowses consisted formerly of wooden apparatus, and were actually employed in drawing the ore raised from the mines. In the lapse of time the barmasters suffered the erection of "sham stowses," consisting of several diminutive pieces of wood united together with wood, fixed in the ground, and suspended "in all men's sight." The custom required the mine to be regularly worked, but it was much infringed by the use of these fictitious stowses. By the erection and maintenance of these trifling articles, the right to the meer must be preserved, even if the working stowses be superseded by the erection of powerful engines. If these stowses are destroyed or not kept in good repair, or not replaced by others, the meer of ground will be forfeited, unless they are removed by accident or some unusual and indirect means, in which case they are directed by the barmaster to be made good on pain of forfeiture. It was always necessary that the mine should continue to be fairly worked. If capable of being wrought, and it was unwrought for a few weeks together, the barmaster was required to "nick the spindle" once a week for three weeks, and the mine, if unwrought within that period, became forfeited a few days after the last nick, and might be disposed of to others. The spindle is a small piece of wood belonging to the stowses, fixed in the ground to mark the boundary of the meer; and by nicking is meant notching. This ceremony, therefore, is equivalent to an entry after breach of condition, by which the lord or lessor is restored to his former estate; and it

was often resorted to for effectually determining former claims. But this custom was, in general, much disregarded. The recent statutes provide means of forfeiture and of assignment to others, in case of mines remaining unworked, without any such process. In the manors comprised in these acts all stowses, real or fictitious, have been abandoned.

The duties payable in respect of lead ore raised in the manors of High and Low Peak belong to the crown in right of the Duchy of Lancaster; but they are usually farmed out to influential owners in the vicinity. The duties in the other customary manors belong, of course, to the lords of the manor or their grantees. It was formerly contended that the inferior kind of ores called smitham and forested ore were not liable to duty at all. They are expressly stated to be exempt from all duty but cope in the articles of the Low Peak, and partially so in other places; but it has been decided otherwise by two successive actions at law—the first in 1750, against the miners of the High Peak, and the other in 1773, against the miners of the Low Peak.

The amount of duty is usually one-thirteenth part of the ore raised. The lord is also entitled to sixpence or fourpence for every load of ore carried off from the ground. This is called cope. The load is in nine dishes, and the contents of a dish vary from fourteen to sixteen pints. The celebrated brazen standard dish of Wirksworth, in the Low Peak, contains almost precisely fourteen pints. The High Peak Act specifies fifteen pints. Provisions are made for keeping a sufficient number of measures, and for preventing removal of ores before measurement, or before the mine is "freed" (*f*).

The payment of the duty is stated by some of the customs to entitle the miners to timber from the king's

(*f*) See Att.-Gen. *v.* Wall, 4 Brown, P. C. 665, as to exemption of *smytham*, or dust ore.

forests. But this practice has been discontinued, probably from the absence of timber or its distance from the mining operations.

The Barmaster [Berg-master] is a chief officer formerly appointed by the miners and merchants, but now by the lords or farmers of the duties, who has important functions to perform towards all those interested in the mines—sometimes with the concurrence of two grand jurymen. He is required to ascertain and lay out the meers on every occasion—to mark our ways to the highway—and water for washing ore—to visit and examine the meers regularly for the purpose of discovering any causes of forfeiture—to measure out the ore actually raised—to secure the render of lot and cope duties—to enter into all mines—to arrange for the settlement of disputes in title—to execute the warrants of the steward, and deliver possession of all mines—to sell the lord's meers—to hold courts, summon juries and present offences—and generally to observe and enforce the customs of the manor.

Any interest in a mine is transferred by entry in the barmaster's book, and, in disputed titles, every document entered in his book is entitled to priority over later entries. All titles date from his gift, and not from any precedence in actual working.

There are also special regulations for the use of ways and water, for the working of cross veins, and of two veins approaching each other, parted with a rither or rider.

Actions of title or trespass, or of debt for mining articles, or for work or labour, may be brought in the small Barmote Court. Only one action is now allowed to be brought for one cause of plaint, except under orders for new trial by the steward. Any partner refusing to work or to contribute his proportion of expenses for twenty-one days, forfeits his share, which can be summarily recovered in the small Barmote Court. Views by the grand jury may be required. When any mine is freed from water by the operations of other miners, they may claim a portion

of the ores afterwards raised from the mine so relieved, to be settled by the barmaster and grand jury. The titles of two or more contiguous mines belonging to the same persons may be consolidated with the consent of the barmaster and grand jury, and the mines worked as one mine. In disputed workings, on a majority of the grand jury finding sufficient ground for the dispute, the steward may require security for the value of all the disputed ore to be abstracted, or may direct the ore to be retained till further operations have led to a satisfactory opinion.

Both statutes provide for the appointment of stewards and barmasters, and contain a complete reform of the practice and process of the Courts. The lord or lessee under the crown of the king's field cannot hold the office of barmaster (*g*).

The great Barmote Courts of the manors are generally held twice in every year, in April and October. The small Barmote Courts, in which all disputes and differences arising in the prosecution of mines are decided, are held as occasion may require. The jurisdiction is concurrent with that of the ordinary Courts, and is subject to writ of *certiorari*, before or after trial. At the discretion of the superior Courts, a grand jury, composed of twelve persons experienced in practical mining, and intended to act as occasion may require, are appointed at the great Barmote Courts.

An act was formerly passed for regulating the proceedings in the Courts Baron of the hundred of High Peak and manor of Castleton (*h*), and extended by a later act (*i*), by which all persons residing within the jurisdiction are to be sued there, when the debt and damages are under 5*l*. It is competent for the Judge of any Court to find the residence; and he is bound to nonsuit the plaintiff without

(*g*) Arkwright *v.* Cantrell, 7 Ad. & E. 565.

(*h*) 33 Geo. 2, c. 31.

(*i*) 45 Geo. 3, c. 61.

reference to the pleadings or the issue raised, unless the freehold or title to land be in question (*k*).

The duties arising in mineral districts, subject to peculiar customs, and payable in kind, are liable to the poor rate. All money payments, as cope, are exempt (*l*). Tithe ore is also rateable to the poor.

It has been decided that the customs of Derbyshire will not authorize the erection of fire engines for drawing water from the mines against the consent of the proprietor of the land. A proprietor brought an action for the erection of more than the customary hovels and sheds, and for the erection of fire engines. It was held, that a miner had no right to erect more than the customary sheds and hovels, and that the engines being unknown till within a recent period, could not be erected without the consent of the proprietor, and that the workmen were not justified by the custom in living upon the land (*m*). Such a decision could not now be supported with respect to the engines (*n*). The new customs extend expressly to all mining purposes.

All other minerals, except lead, belong to the proprietors of the land, or, in waste lands, to the lord of the manor. When a mine is abandoned, all the produce left by the adventurers belongs to the same persons (*o*).

In general, tithes are not payable in respect of minerals and things which are not of the increase, but of the substance of the earth (*p*). But by particular custom any mineral substances may be subject to the payment of tithes (*q*). In Derbyshire tithes are thus payable for lead

(*k*) Hildyard *v.* Webster, 1 Dowl. & L. 950; 13 L. J., C. P. 94.

(*l*) See Chap. XII.

(*m*) Harpur *v.* Governor and Company for Smelting Lead, Derby Assizes, 22nd March, 1753.

(*n*) See Chap. V.

(*o*) Lee *v.* Shore, Derby Summer Assizes, 1822.

(*p*) 2 Inst. 651; Amiles *v.* Chambers, 1 Mod. 35; 1 E. & Y. 480; Stoutfil's case, 2 Mod. 77; 1 E. & Y. 509; 6 Bac. Abr. 712.

(*q*) 2 Inst. 664.

ore. The pretence for claiming tithe is said to have originated in the once prevalent notion that metallic ores are in a constant state of growth and increase in the veins. In the High Peak, a full tenth of lead ore is stated to be due, but one-nineteenth is usually received. In Wirksworth and other places a fortieth only is paid, and in other places the tithe is commuted for a small modus or money payment.

The tithe of mines may be either in the nature of a predial tithe, by the dish or drill, in its natural state, without any deduction for expenses, or as a personal tithe, with an allowance for labour and other incidental charges (*r*). In Derbyshire, it is generally payable in the former manner.

A lime kiln and salt works may be liable to customary tithe (*s*).

By the statute for the commutation of tithes, special provision is required to be inserted in the parochial agreement, and specially approved of by the commissioners, for the commutation of any mineral tithes (*t*).

Such are the mineral customs of Derbyshire, many of which appear to have fallen into practical desuetude, and all of which would seem to require, for the interests of all parties, a careful revision.

It may easily be supposed that the operation of the above customs must often have materially interfered with the improvements of the agriculturist, and with the enjoyment of the private proprietor. If the customs had been confined to a mountainous district, destined to remain in

(*r*) Brown *v.* Vermuden, 1 Ch. Ca. 272, 282; 1 E. & Y. 509; Tully *v.* Halsall, 1 Wood, 74; Pindar *v.* Jackson, 1 Wood, 315; 1 E. & Y. 583; Basire *v.* Wharton, 1 Wood, 83; Lord Lonsdale *v.* Bathurst, 2 Wood, 302; Buxton *v.* Hutchinson, 2 Vern. 46.

(*s*) Thomas *v.* Perry, 1 Roll. Abr. 642.

(*t*) 6 & 7 Will. 4, c. 71, s. 276. See also 2 & 3 Vict. c. 62, s. 9.

a perpetual state of nature, their operation would have effected little injury to the interests of those acquiring rights in the surface. But it was very different when they were to be exercised in the improved inclosure or the ancient meadow. The permission of fictitious stowses, accompanied with occasional and colourable operations, enabled the proprietors of the surface to protect themselves in some degree from the attempts of the adventurer. By the custom no actual estate could be obtained without the delivery to the lord of a dish of ore obtained from the meer. But this preliminary was also dispensed with, or at any rate the barmaster was not in the habit of making very anxious inquiries about the source from which the lord's dish was derived. Proprietors of lands, therefore, were thus permitted to acquire themselves the right to unoccupied mines in their lands without contracting the necessity for effectually working them. But this practice could not be relied on, after the analogous case of Rogers *v.* Brenton, in Cornwall (*u*). The new acts also deprive the landowners of these usual means of protection.

In a country much worked, mining operations must often be conducted upon a large and extensive scale, and under no apprehensions of undue interruption. These customs were never adapted for such enlarged designs. Costly and uncertain projects may be prevented, defeated, or materially injured by the prior claims of small speculators, who may have acquired and maintained their rights by questionable means, and who are unwilling or unable either to carry on vigorous operations themselves, and yet thus prevent others from exploring the resources of the country, and pursuing the true course of their discoveries. The arrangements with respect to the commission of injuries and payment of damages seem also to be unsatisfactory. Such a state of things calls for a remedy. If it is not applied, the spirit of mining within particular districts

(*u*) See next Section.

must either become extinct, or it will be mostly expended in trivial, isolated, and profitless operations. Such a subject can only be effectually treated by the interference of the legislature. The late acts can hardly be considered to have effected any adequate amendment of this kind.

Section II.

IN CORNWALL AND DEVONSHIRE.

The peculiar customs of the above counties apply exclusively to mines of *tin*, in the same manner as those of Derbyshire are only applicable to lead.

The tin mines of Cornwall and Devon must be ranked amongst the most ancient mines in Europe. Their existence and prosecution seem coeval with the first records of civilization.

Like all mining customs, the origin of those of the Stannaries is involved in great obscurity. It would seem, however, that the tin of these counties has, in all earlier ages, been claimed as part of the royal domain. It is quite clear from the terms of the charters of Edward the First, that it was then considered to belong exclusively to the Crown. By those charters, the King granted liberty to the tinners of Cornwall and Devon to dig tin everywhere in the lands, moors and wastes of the Crown, and of all other persons whomsoever in the two counties (*x*).

It was contended, in a case cited below, that the custom should be regarded as the local law of a provincial realm, possibly prevailing before Cornwall or Devon were parts of England, rather than a common custom within a certain district. But the argument was held to fail both in historical certainty and in legal authority (*y*). Such a claim

(*x*) See Laws of the Stannaries, p. 54; 12 Cooke, 11; Rowe *v.* Brenton, 3 Man. & R. 497, Appendix; Concanen, 205.

(*y*) Rogers *v.* Brenton, infra. See case of Tannistry, Davis, 28; Vin. Abr. *Cust.* H. fol. 10.

would amount to *imperium in imperio*. It may be thought probable that these mining rights are descended from a very remote antiquity, even from the times of Tyre and Sidon, surviving all changes of conquest, language and race, and recognized by successive conquerors as provincial laws. Such, indeed, was the actual practice of the Romans, who confirmed the rights of previous mineral owners, and claimed only the rights of the government that was overthrown (*z*). But all claims of this kind, whatever may be their origin, can only exist as customs incorporated into a new social system, and not as a ruin of the ancient fabric. The law of England allows no supremacy of this kind. It tolerates a *lex loci* as a reasonable usage, and it only admits the written Pandects of Justinian and the decretals of Gregory in the same humble garb of custom.

The privileges thus conferred upon the tinners of the western counties were afterwards regulated by local parliaments or convocations. We may first notice those of Cornwall.

The Stannary Parliaments of Cornwall are summoned and presided over by the Lord Warden or Vice-Warden, who are officers of the Duchy. These assemblies consist of twenty-four representatives returned in equal numbers from each of the Stannaries of Foymore, Blackmore, Tywarnhaile, and that of Penwith and Kirrier, and who are generally some of the principal gentlemen of the county. Sixteen of these Stannators form a binding majority (*a*). They are returned by the mayors of the four Stannary towns, and they select, during their sittings, as many assistants from those practically concerned in tin works as they think proper, who form a lower house of convocation (*b*). The customs of this county have been ascertained at various times by convocations thus held

(*z*) Livy, 45, 29; Pliny, 33, 31; Diod. 5, 38; Tacit. An. 11, 20; Strabo, 13, 3.

(*a*) Convoc. 11 Cha. 1, 1.

(*b*) Carew, by Tonkin, 60; Doderidge's Cornwall, 94.

successively in the 22nd James 1, the 11th Charles 1, the 12th Charles 1, the 2nd James 2, the 2nd Anne, and the 26th George 2.

The right of working tin mines was originally conferred upon all free tinners upon the render of a certain proportion of the minerals raised to the owner or lord of the soil. This proportion is called the *toll tin*, and is usually one-fifteenth of the produce. By particular custom it amounts to one-tenth.

But it could not be supposed that adventurers in search of tin mines should continue to exercise their rights over such valuable property in the same manner as the occupiers of a common quarry, or as if they were only interested in the common minerals of a public waste. The attainment of all metallic ores, even in those remote time, required some expenditure and labour, and was liable to fluctuations of success and misfortune. It thus became necessary to prevent other adventurers from reaping the profits discovered by the skill and labour of the successful miner. From this source, therefore, may be traced the origin of *tin bounds*, by which, as in Derbyshire, and in the Forest of Dean, the adventurer acquired an exclusive and indefeasible title to the property proposed to be explored, and was, in return, restricted in his operations within defined limits.

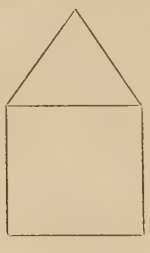
The manner of acquiring tin bounds has been often defined by the local parliaments. Any tinner is allowed to bound any unappropriated *waste* lands, or any several or inclosed lands *which have been formerly waste land*, and subject to the custom, by delivery of toll tin to the lord of the soil. In all lands exempt from the custom, the tin must be considered to have been appropriated to the owners of the soil (*c*). The assessionable or conventionary manors of the Duchy of Cornwall are equally subject to the custom (*d*). In lands not subject to the custom of

(*c*) Conv. 11 Cha. 1, 31; 26 Geo. 2, 8.

(*d*) See 7 & 8 Vict. c. 105, ss. 32, 84.

bounding, the right to tin mines is regulated by the general law of the realm.

All tin bounds generally consist of about an acre of land, and are required to have four corners, and to be defined by twenty-four turfs or stones, six to each corner. There may also be a side bound, generally of a triangular form (*e*). The shape of a bound is thus delineated (*f*):—



Every bounder is required, however, to proclaim at the next Stannary Court the date of his possession, the names of his partners, and of the person who cut the bound, and the limits. If this is not complied with, the boundary is void. The same proclamation must be made in the two following Courts, and posted up in the Court. Any person disputing the title of the bounder must forthwith proceed to resist it by an action of trespass. Notice, in writing, of the cutting was originally required to be given to the owner of the soil, or his agents, within one year (*g*), and toll tin to be delivered within three years, or the bounds to be effectually worked (*h*). But it was afterwards required that all future bounds should be void unless three months' notice in writing, previous to the cutting, be given to the owner of the soil, and that if the latter should think fit to cut the intended bounds to his own use, he may, within three months after notice, proceed to do so; but in case of neglect, the bounder, upon proof of notice,

(*e*) Conv. 2 Jac. 2, 2.
(*f*) Ibid.
(*g*) 22 Jac. 1, 17; 11 Cha. 1, 15; 2 Jac. 2, 1.
(*h*) 16 Geo. 2, 8.

may, after three months, cut the bounds and establish his title in the usual way (*i*). This provision, of course, effectually prevented the acquisition of many new bounds (*k*).

If the claim of the bounder is not successfully resisted, he then becomes, after the competent period, entitled to his writ of possession. The right of the bounder is then absolute, and it may be exercised without any other compensation to the landowner than the toll tin. The peculiar property thus acquired constitutes chattels real, and devolves upon the personal representative of the owner for the time being, subject to the payment of debts and legacies, and to absolute or partial disposition by deed or will (*l*).

But if the bounds be unworked for twelve months, any other tinner may, by notice to the owners, and declaration on oath, of the limits, owners, time and manner of notice, within two months afterwards, be permitted to work the bounds, on payment of the usual farm, and upon giving a bond for the effectual and proper working of the bounds, on breach of which the owner may enter again (*m*).

All bounds also require to be annually renewed (*n*). This ceremony is performed on specified saint days, and consists in cutting a turf from each corner, and placing it on the adjacent hillocks; it is also declared in whose names the bounds are renewed. But if the day of renewing is suffered to pass, the bounds may be afterwards effectually renewed, if no tinner has previously made a new title to them (*o*). It is also provided, that if a keeper of any bounds for another person or a partner shall suffer bounds to be unrenewed, without reasonable warning to the other owners, any new claim or cutting shall enure for the benefit of the old owners, not privy to any fraud, in

(*i*) 26 Geo. 2, 4.
(*k*) Pryce's Min. Cornub. Chap. III.
(*l*) 2 Jac. 2, 4.
(*m*) 11 Cha. 1, 31, amended, 26 Geo. 2, 8.
(*n*) Ibid. 2.
(*o*) 22 Jac. 1, 18.

exclusion of the offending partner. Any keeper or other person guilty of fraud in cutting new bounds, in such cases, or any keeper being unwilling to show the limits of the bounds to the owners, or defacing the bounds, is liable to a penalty of 50*l.* A partner guilty of fraud is also liable to a penalty of 20*l.* A bounder, renewer or keeper neglecting upon request to show the limits to the owner of the soil or his agent on the day of renewal, is liable to a penalty of 20*l.* (*p*).

An owner of bounds who has been in possession for a year and a day cannot be dispossessed or disturbed by any order, injunction, or any other proceeding except a verdict. If neither party has been in possession for that period, the party first acquiring possession shall continue to retain it till verdict is given against him, but the farm tin in the meantime is to be sequestered and deposited in different hands (*q*).

The owner of the bounds often demise them to others, subject to the payment of *farm tin* or *tin dues.* But the bounds still continue liable to the render of *toll tin* to the owner of the soil, and the bounder himself is responsible for its being rendered. Farm tin is an ascertained payment to the bounder of one-twelfth of the remainder, or, by peculiar custom, of one-tenth. It is stated by a recent writer on this subject, that the owner of the soil may elect to take the bounds himself, or even demise them to others, subject to the usual payment (*r*). If the bounds are let for an undefined period, even by parol, and the lessee has been in possession a year and a day, his term is indefeasible and perpetual, so long as he complies with the requisitions of the customs. But any person taking a set or lease who does not effectually prosecute the works, is liable, by cus-

(*p*) 22 Jac. 1, 22; 11 Cha. 1, 26, amended, 26 Geo. 2, 8.

(*q*) 22 Jac. 1, 21; 11 Cha. 1, 18.

(*r*) Basset's Letter on the Bounding Custom, 1839. But see Pryce's Min. Cor. Chap. III. There is no provision of this kind in the *lex scripta.*

tom, to the forfeiture of his interest (*s*). This provision has been much disregarded (*t*).

If any partner, or the personal representative of any partner, shall refuse or neglect to contribute his proportion of the costs and expenses in carrying on any tin mine for three months after the account has been made up by the purser or clerk, and approved of by a majority of the partners, and a copy delivered to the offending party, then the lord warden or vice warden may order such costs to be paid; and if these are not paid within a month from his being served with a copy of the decree or order, then, upon further application, the tin of the defendant may be ordered to be sold, and if insufficient, his shares in the mines may be sold by auction to defray the costs and expenses, and costs of suit (*u*). If the shares cannot be sold for any money, they may be forfeited to the use of the other adventurers. Accounts, orders and decrees affixed upon any public place at the mine are good notice and service as to such persons as live out of the limits of the Stannaries (*x*).

If a partner in a tin mine shall not, within a month after notice, demise his portion, or contribute labour or money according to his share, he may be precluded afterwards from taking any active part in the adventure, and must abide by the management of a majority of the other partners, and be entitled to his proportion of the farm only. In case of contribution of labour by some, and money by others, the farm is to be assessed by three indifferent tinners, one chosen by the working partners, another by those not working, and the third by the steward of the Court (*y*).

Any partner is permitted to contribute his proportion of any mining materials which are required instead of a

(*s*) 16 Geo. 2, 14.
(*t*) See below.
(*u*) See 6 & 7 Will. 4, c. 106, s. 19, infra.
(*x*) 16 Geo. 2, 11.
(*y*) 22 Jac. 1, 19; 11 Cha. 1, 16; 16 Geo. 2, 8.

money payment, and the value of such materials is to be fixed by a majority at the time the accounts are passed, of which one week's notice is always to be given to each partner or his agent (*z*).

Every partner is required to give notice, in writing, of the name and habitation of any person purchasing his share, and notice must be given by all parties of the persons appointed to manage on their behalf (*a*).

The creditors and labourers of a firm can only sue the partners who contracted with them, subject, however, to contribution amongst themselves, for which their proportion of the tin may be sequestrated till the matter be tried (*b*). Every tinner defrauding his partner to the amount of one shilling is liable to a penalty not exceeding 50*l.* (*c*).

Several regulations are made with respect to blowing, and the modern mode of smelting tin, the removal of tin from smelting houses, and the periodical coinage of tin. By a late statute, however, the coinage of tin is altogether dispensed with, and the duties abolished (*d*).

Tinners are free from all taxes and tolls in selling their goods at fairs or markets (*e*), and from all tithes in respect of their wages or profits (*f*).

Tinners may carry an adit for water through the bounds of any other persons in wastes without leave, but all tin which may be discovered must be left for the owners of the bounds. But this privilege does not extend to lands held in severalty (*g*).

Any person using violence, and forcibly taking away any tin from any work, is liable to pay double the value, and to be fined 5*l.* or 20*l.* (*h*).

(*z*) 11 Cha. 1, 5.
(*a*) Ibid.
(*b*) 11 Cha. 1, 6.
(*c*) 11 Cha. 1, 22, amended by 16 Geo. 2, 15.
(*d*) 1 & 2 Vict. c. 120.
(*e*) 22 Jac. 1, 14; 16 Cha. 1, 15.
(*f*) Ibid. 16, and 11 Cha. 1, 14.
(*g*) 11 Cha. 1, 28.
(*h*) 11 Cha. 1, 32.

Any person suspected, either in several or waste lands, of working tin in the lands of others, may be complained against to the vice warden, who may order an inspection by three indifferent persons. An action of trespass may be brought against any persons persisting to work wrongfully, or refusing to refund the tin so carried away. The owners of adjoining lands or mines may also go down to examine the workings of others, and to solve any doubt as to trespass. In cases of resistance, an injunction may be obtained for restraining further operations (*i*).

No vice warden, steward, bailiff, attorney, lawyer or any other officer in the Stannary Courts, nor any man of power, nor their children, clerks, servants or friends in trust for them, are to be made owners in any tin works in litigation. All rights so disposed may be forfeited to the poor. A penalty is affixed to the offence of maintenance (*k*).

No person is entitled to spoil or divert any waters running to houses for the service of the family, nor from any ancient mill; and any person disturbing any running water out of malice is liable to a penalty of 5*l.* (*l*) If any lands be overflowed by streamers suffering their stones and gravel to fall into rivers, and the streamer shall not upon two days' notice clear the river so as to prevent the overflow, he is liable to damages and costs occasioned, and to a penalty of 5*l.* (*m*).

By 23 Hen. 8, c. 8, and 27 Hen. 8, c. 23, it is enacted, upon the complaint of the inhabitants of Plymouth, Dartmouth, Teignmouth, Falmouth and Fowey, that no persons work stream tin works in the two counties near any fresh waters, rivers or low places, descending to those ports, nor unless the owner or washer shall make sufficient hatches and ties [levels] in the end of the buddles and cords, to keep the gravel and rubbish from the

(*i*) 2 Jam. 2, 8, repealed and amended by 26 Geo. 2, 9.
(*k*) 22 Jam. 1, 20; 11 Cha. 1, 17.
(*l*) 26 Geo. 2, 12.
(*m*) Ibid. 13.

rivers and watercourses. A penalty of 20*l.* is imposed upon such offenders, and a fine of forty marks by the custom (*n*).

The right to divert water for the use of the tin bounds is affirmed in the charter of John and Edw. I. The tinners are empowered "*divertere aquas—sicut consueverunt.*" The practice, as shown by the Court rolls, has been extensive in both counties.

This right is supposed to have been much impaired by a late case at *nisi prius* (*o*). In that case which occurred in Devon, the custom claimed a right not only to divert water from any stream, but to dig trenches in *any* lands for the watercourse. The trenches had been made through the lawn, garden and woods of the plaintiff. Tindal, C. J., in his address to the jury, gave no opinion on the validity of the custom in point of law, but, with respect to its existence in fact, he said, it interfered so much with the rights of private property, as to require strong evidence for its support. The jury were not called on to say whether it was a reasonable custom or not, for that was a matter of law not submitted to them by the pleadings; yet they might properly look to its nature as affecting the evidence required for it. They were not to conclude that the inhabitants of a large district surrendered their rights over their own soil, unless repeated acts of exercise were proved, with acquiescence. The jury found against the custom.

It has been inferred from this case, that such a custom cannot be claimed in any modified manner. But if it can be found to exist as a matter of fact, there seems to be no ground for that conclusion. It is stated that such a custom would probably be found to exist in Cornwall where bounding is more practised. In point of law, it is by no means determined that the custom, in its most enlarged sense,

(*n*) See Pearce, 154.

(*o*) Bastard *v.* Smith, 2 M. & R. 129.

would not be valid. For such a custom, once reasonable, but afterwards becoming grievous and oppressive, is no less of the nature of an inheritance, which cannot be taken away, except by Act of Parliament (*p*). The custom of bounding may be considered oppressive with respect to inclosed lands. But its origin was reasonable, and the acts of the landowners themselves have rendered it grievous.

The right to water in ancient tin-bounds has lately been much discussed. A tin mine had been worked by bounders for many hundred years, probably under several successive claims of title by bounding. An artificial watercourse, situate above the lands actually bounded, and which might have been as old as the mine itself, had been used by the bounders for their mining purposes. In 1856, the mine was abandoned by the bounders, and the concern was broken up by sale of all the materials. In the same year, the mining works were resumed by other adventurers, who had become tenants in common in fee simple of the mines, though not of the lands in which they were situate, and who claimed the watercourse by prescription against the owner of the lands above through which it was carried. It was held by Kindersley, V. C., that they had not shown any sufficient continuance of title from the bounders, and, therefore, they had not acquired any new title under the Prescription Act by an adverse enjoyment which had only existed for eight or nine years. They had claimed the right in respect of the same estate as the bounders had, but the right had returned to the landowner by the abandonment, and had not gone to those who represented the bounders only in estate, and not in the customary privileges. But this decision was reversed, on appeal, on the ground, that the right to the water had been acquired by the owners of the soil, and not by the bounders. Lord Cranworth observed, that the estate of the tin-bounders

(*p*) 2 Inst. 664; Gilb. Ten. 323; Fawcet *v.* Lowther, 2 Ves. sen. 303.

was a mere chattel interest passing to executors, and not to heirs, and they lost all their interest if they ceased to work the mine. Their title was not derived from the owner of the land, though they were bound to make him a render dependent on the quantity of ore raised. There was strong reason to think that no bounding would have taken place if there been no stream, in which case the right would have been that of the owner. But if the land had been bounded without the stream, which was afterwards brought to the land by some arrangement made with the owners of the land where it took its rise, it should be presumed that such a diversion was made by arrangement with the owners of the lands bounded and not with the bounders. There was nothing in the custom, as stated in the books, which would enable the bounders *invito domino* to cause a stream of water to flow over the lands bounded. Such water might be beneficial to the bounders, but injurious to the owners of the land. Unless, therefore, this was expressly authorized by the custom, it could only be done by arrangement with the owner—and, if so, the probability would be that what he was consenting to for the convenience of those working the mine should be so secured, that, if the workings should be discontinued, he might have the benefit of the arrangement. Though the bounders do not derive title from the owner of the land bounded, and though their title may even be adverse to his, yet, when the workings have commenced, it is his interest that those engaged in the work should have the best facilities for obtaining the largest produce—as, by the custom, he is entitled, without cost, to a share of all the ore raised. Any such arrangement would therefore very probably be made with the owner, who had an immediate and possibly a reversionary interest, and not with those who had uncertain rights, and who had no hereditary succession (*q*).

(*q*) Ivimey *v.* Stocker, 34 L. J.,Ch. 633; 35 Ibid. 467.

In the above case, the plaintiffs had also been in possession of two other mines, lower down, which had never been worked by bounders, but which had been worked by the plaintiffs as their licensees, by the aid of the same stream, for a period exceeding that required by the statute. It was held, that they had acquired a right to the continuance of the easement also in respect of these mines.

When a right to water has been enjoyed without interruption, for twenty years, it cannot be defeated by proof that the land is within the district of tin-bounds. If the rights of the tin-bounder are in actual operation, he may claim them as customary rights, but, if they are not exercised, the general law applies to Cornwall as to other places (*r*).

The customs of the Stannaries of Devon have been also partially ascertained by the local parliaments of that county.

These parliaments are composed of jurors returned by each of the Stannary Courts of Chaggeforde, Ashburton, Plympton and Tavistock. Each of these Courts return twenty-four jurors, whose united acts bind the rest of the county.

The written customs were determined in this manner in parliaments held in 2 Hen. 8, 24 Hen. 8, 25 Hen. 8, 6 Edw. 6, and 16 Elizabeth (*s*). Their provisions are very similar to those of Cornwall, though they are not conveyed in equally intelligible language or perspicuous order.

The leading points of difference seem to be, that the tin bounds of Devon do not constitute personal but real estate, subject to all the usual incidents (*t*); the removal of bounds is to take place between the feast of St. Peter

(*r*) Gaved *v.* Martyn, 19 C. B. 732; 34 L. J., C. P. 353.

(*s*) See Pearce's Stannary Laws, B.

190, 200, 208, 217, 226.

(*t*) Parl. 2 Hen. 8, 21; 25 Hen. 8, 1.

and Michaelmas, and the new bounds to be made between Michaelmas and All Saints, in the presence of four or five tinners, subject to several special and some contradictory provisions; and the tinner is not to work in or under any *bonâ fide* meadow, orchard, garden, mansion-house, buildings or curtilages belonging to it, or tillage land during the growth of any corn, nor destroy any timber trees to the number of twenty, of the growth of twenty years, without the consent of the owner and tenant, subject to a penalty of 5*l.* and treble damages (*u*). It is stated to be the custom in this county to give no toll tin to the landowner, or any other compensation. There is great reason for believing that such a custom could not be supported (*v*).

The custom of tin bounding, which has in recent times fallen into some desuetude, has lately been much discussed, and particularly with reference to the manner in which the bounds are preserved as property.

It is quite clear, that a person unlawfully dispossessed of the actual possession of tin bounds can recover them in an action of ejectment (*w*).

A mine was defended against the landowner as *lying within certain bounds called tin bounds.* The bounds had been removed for a period beyond living memory, and the mine had formerly been worked by the bound-owners. In 1834, the defendant had for some months tried to discover ore, and then abandoned the mine, and removed the machinery. In 1835, the plaintiff granted a set to another person, who was successful, and who was forcibly expelled by the defendant. The first trial at *nisi prius* failed for not presenting the interest of the bound-owner to the jury as depending on the custom. At the second trial, it was left

(*u*) 16 Eliz.

(*v*) Rogers *v.* Brenton, infra. p. 35; Rogers *v.* Brenton, infra.

(*w*) Vice *v.* Thomas, Smirke, Stan. See Ivimey *v.* Stocker, 34 L. J., Ch. 639.

to the jury to say whether the custom gave an easement, only, or a right to enter and work, or such a right as might, for the purpose of getting tin, exclude the lord from the possession. It was put as a matter of fact; but it was stated that, if it turned out to be matter of law, the Court above would deal with it. The jury found that the bound-owner had a right to the mine, and not a mere easement; that the bounds were immemorial; but that they had not been properly kept up. A verdict was then entered for the plaintiff, which was not disturbed (*x*).

But the custom will not preserve the bounds, unless the mines are actually worked. It had been usual for the bound-owners on ceasing to work, annually to renew the bounds by turning up a turf at the four corners, as above mentioned; and bounds in this state have long been subjects of sale, settlements and devises. In a late important case, the defendant contended that the plaintiff, the alleged bound-owner, could only continue his right, under the custom to work the mine by continued operations, and that the annual renewal was only designed to preserve and identify the boundaries. The evidence of professional persons differed, even as to the necessity of any annual renewal at all. Lord Denman, in giving the judgment, after adverting to the resolution in Plowden (*y*), which maintains the right of all proprietors, without reference to any county or district, to all the mines within their lands, except those of silver and gold, said that the custom of bounding, though a strong invasion of private rights, was reasonable, and prevented the landowner from locking up property which was of eminent benefit to the public; but that the right cannot be preserved without the real prosecution of the mine. Bounding empowered a stranger not only to extract the mineral, but to enter on the surface and cumber it with

(*x*) Doe *d.* Earl of Falmouth *v.* Alderson, Smirke, 39; 1 Mee. & W. 210. See Crease *v.* Barrett, 1 Cr., M. & R. 919.

(*y*) Page 336.

machinery, buildings and refuse. The only thing which rendered this reasonable was the render of the toll tin to the landowner, and the benefit to the public; but these were both lost, and possibly prevented, if the bounder declined to work, and retained the right to exclude the owner. Many bounds might become the property of the same owners, who might limit the supply and diminish competition, while the owner would decline to expend his capital on building, or agricultural improvements; because at any time the bounder might renew his operations, and, entirely and without compensation, defeat the purposes of his expenditure. If it were said that the public good was best served by a regulated supply, and that the bounder would find it his interest to work, when the public required the supply, it might be answered that where such a state of things has existed so long and so decidedly, as to amount to reasonable proof, that the original purpose, for which the bounds were inclosed, had been abandoned, it was unreasonable to maintain the bounds themselves. The owner himself may not have enclosed the land, or worked for the mineral, on account of temporary inability, or the same causes that are alleged to actuate the bounder. Why is he to lose his earlier and better right for ever, and the bounder, under the same circumstances, to preserve his? Besides, the purpose of the custom was not founded on the doctrine of demand and supply, but on the expediency simply of bringing the mineral to the surface for the use of men. Again, a render of a portion of the mineral is part of the consideration for the bounder's right, part of the original compact, without which the landowner might never have consented to the bounds—quite independent of the question of profitable working by the miner. The mode of annual renewal is useful for keeping the limits well ascertained; but it is no substitute for the working itself, as the ground of reasonable custom (*z*).

(*z*) Rogers *v.* Brenton, 10 Q. B. 26; 17 L. J., N. S., Q. B. 34.

It was contended, in the above case, that the bounder took a profit in the soil of another, and that such a claim could not subsist by custom, but only by prescription (*a*). But it was held, that a prescriptive interest must have some person in whom to reside, as in the case of commoners claiming common in the lands of others in the name of the lord; and that necessity compelled a claim by custom on the part of persons having no permanent existence, as in the case of commoners in gross claiming in the wastes of the lord (*b*).

It was also held, that the bounder should be allowed all reasonable time for consideration and preparation of plans and operations; that when he ceased to work, after having once *bonâ fide* worked, his conduct would be open to explanation, so as to prevent forfeiture; and that it was only when his conduct warranted the conclusion that he had ceased to be in good faith pursuing that object, which alone justified his entry, that forfeiture would occur (*c*).

The decision in the case of Rogers *v.* Brenton seems to defeat all such claims to bounds as have only been attempted to be preserved by yearly renewals without working. In other cases, several reasons have been assigned for considering that the right of bounding might be impeached as a valid custom (*d*). But these reasons do not appear to warrant the suggestion. The only one which seems to be of much weight arises from the *uncertainty* of the area to be bounded, and, it is said, it has been *attempted* to bound the whole of Dartmoor. In the case just cited, it was stated by an experienced witness, that he remembered a pair of tin bounds "a quarter of a mile each way"—the largest he knew of. They are usually much smaller. The *meers* in Derbyshire are exactly defined by the customs. But the same evidence which proves the custom

(*a*) Blewett *v.* Tregonning, 3 Ad. & E. 554.

(*b*) See remarks in the Att.-Gen. *v.* Mathias, 27 L. J., Ch. 766; 4 Kay & J. 579.

(*c*) See Vice *v.* Thomas, supra.

(*d*) Smirke, Stan.

may also prove its extent. *Id certum est quod potest reddi certum.* If too much land is bounded, there is an appeal to the Stannary Courts. A custom is not uncertain, because its exercise is left to reasonable discretion—as in the case of drying nets, or the building of bulwarks for public defence, in the lands of others (*e*).

Although several mines are worked, as tin bounds, there are very rare instances of acquiring new bounds according to the custom. But if the custom is good at all, it will, of course, sanction the claim of new bounds within any waste land or land previously bounded, whatever may be the nature of the improvements on the inclosed lands. Such a state of things does not seem to harmonize with the present state of society; and there are good grounds for appealing to the legislature for the abolition of the custom, subject to some provisions for existing rights. The absence of all compensation, in the case of inclosed lands, is a serious evil. The mixture of tin ores with those of other metals, which are not comprised in the custom, must also cause some embarrassment.

The Stannary Courts of Devon and Cornwall for the administration of justice amongst the tin miners of those counties are of very remote origin. They are mentioned in the two charters of King John. Their privileges were confirmed by the charters of 33 Edw. 1, and by private statutes of 50 Edw. 3, and explained by the 16 Charles 1, c. 15. These Courts were instituted for the convenience of the miners, and for the speedy, effectual and inexpensive settlement of mining questions. Accordingly, the tinners were declared by the charters of Edward to be exempt from the ordinary jurisdiction of the general Courts, except in pleas of land, life or limb (*f*).

No writ of error laid from the Stannary Courts, but an

(*e*) Dav. 32; Dyer, 60; 5 Co. 84.

(*f*) 4 Inst. 232, 229; Adam's case, Cro. Car. 333; Rol. 314.

appeal might be made, in common law, from the steward to the vice warden, then to the lord warden, and finally to the privy council of the Duke (*g*).

All labouring tinners, dressers, smelters, and all persons actually employed in tin works, are called privileged tinners (*h*). All privileged tinners who have discontinued their workings, all officers of courts, owners of tin works, adventurers, purchasers of tin, and all others that intermeddle with tin, are called tinners at large (*i*).

With respect to causes arising within the Stannaries, or relating to tin or tin works, the privileged tinner can only, by custom, sue and be sued in his own Court. Tinners, in general, must also proceed against each other in the same place. But they may sue and be sued by *foreigners* —(strangers to the Stannaries)—at common law or in the local Courts, at the election of the plaintiff (*k*). But by 16 Charles 1, c. 15, s. 4, if any defendant of the Stannary Courts shall swear that he is not a tinner, he may be discharged, unless the plaintiff shall swear that he is a true and working tinner, and that the cause of suit arose within the Stannaries, or concerning tin or tin works.

But the local Courts have no jurisdiction for any cause of action not concerning or arising in the Stannaries (*l*). All transitory actions, however, of this nature, between tinners, may be brought in these Courts, or at common law. If one of the parties only be a tinner, the action may be restrained by prohibition. But if the defendant does not plead to the jurisdiction of the Court, and judgment is given, the execution is good, unless, by the plaintiff's own showing, the cause of action arose out of the Stannaries (*m*).

(*g*) 4 Inst. 230; 3 Roll. 183; Trewynnard's case, 4 Eliz. See Dyer, 376; Vin. Abr. Courts; but see 6 & 7 Will. 4, c. 106, s. 42.

(*h*) Conv. 22; James 1, 12; 11 Cha. 1, 5; 4 Inst. 231; 2 Roll. Rep. 44.

(*i*) Conv. 11 Cha. 1, 5.

(*k*) 4 Inst. 230; Resolutions of the Judges; 16 Cha. 1, c. 15, s. 6; Att.-Gen. *v.* Lambe, 11 Beav. 213.

(*l*) Cook, 467; Prohibition, 23, 293; Fleta, lib. 6, c. 7, 9.

(*m*) 4 Inst. 231; Resolutions of the Judges; but see 6 & 7 Will. 4, c. 106, s. 13, infra.

Courts leet are directed to inquire into all offences and breaches of the customs (*n*).

The Stannaries are defined to include all places where some tin work is situate and in actual operation (*o*).

It has been recently much doubted whether there existed in the Stannaries a right to equitable jurisdiction. In consequence of some recent cases (*p*), the Court suspended its equitable proceedings.

The whole jurisdiction and proceedings of the Stannary Courts have recently undergone a complete revision by the general legislature (*q*).

The jurisdiction of the Court of the Vice Warden is extended to the county of Devon, and the Stannaries of both counties now form one entire district. But the common law jurisdiction of the vice warden in respect of causes of action arising in Devon only extends to matters relating to mines.

The Court of the Vice Warden is declared to be a Court of Record, to be held at Truro, at least once in three calendar months, and to be open to all barristers, and all attornies of any of the Courts of Westminster.

The equitable jurisdiction of the vice warden of the Stannaries is extended to all cases arising with respect to the working or carrying on any mine worked for lead, copper or other metal or metallic mineral, or the searching for, working, smelting or purifying any lead, copper or other metal or metallic mineral, as fully as with respect to tin or tin mines. It also extends to non-metallic minerals found in the same mine and worked by the same adventurers. Plumbago or black lead is declared to be a metallic mineral.

The Equity Court of the Stannaries is guided by the same rules of equity which prevail in the Equity Courts at

(*n*) Pearce, 152.

(*o*) 16 Cha. 1, c. 15; Pearce, 146.

(*p*) See Hall *v.* Vivian, Smirke; Vice *v.* Thomas, Ibid. 37; Oppy *v.* Lord De Dunstanville, Ibid. 38. See Vin. Abr. Courts.

(*q*) 6 & 7 Will. 4, c. 106; 2 & 3 Vict. c. 58; 18 Vict. c. 32.

Westminster (*r*). The local Equity Courts are chiefly used for arranging the calls and liabilities of partnerships in cost-book mines, both amongst each other and with respect to the public. The mode of winding up an insolvent concern is cheap, simple and effectual. In accordance with the custom, every creditor, having an equitable lien, may, on petition, procure an order for payment, with costs. In case of non-payment, a sale of the ores, machinery, materials and effects of the partners will be decreed, and the proceeds divided amongst the creditors. This process has been much improved by the late statute, which has, in case of deficiency after a sale of the partnership effects, authorized the Court to proceed against the shareholders as contributories (*s*).

No claim affecting the freehold or inheritance of any person can be entertained by the Court, except by consent of the parties. But the remedy for actions of debt not above 50*l.* is extended to actions of the same amount founded on tort or contract. Mining causes may be removed to the Stannary Court from the County Courts, at the request of either party. But they have a concurrent jurisdiction (*t*).

All the proceedings on the common law side may be removed by writ of *certiorari*, on showing cause that an impartial or sufficient trial cannot be had.

In all cases of partnership formed on the cost-book principle any adventurer may, without suit, and on affidavit showing sufficient grounds, compel the production of the list of shareholders.

Provision is made for the eventual establishment of a separate Court in Devon.

The vice-warden may re-hear and vary his own decrees; and an appeal may be made to the lord warden, who, with the assistance of two or more members of the judicial

(*r*) Vice *v.* Thomas, supra.
(*s*) 18 Vict. c. 32, ss. 4—10.
(*t*) Newton *v.* Nancarrow, 19 L.J., N. S., Q. B. 314. See 9 & 10 Vict. c. 95, ss. 67, 141.

committee of the Privy Council, or Judges of Equity or Common Law Courts at Westminster, may affirm, alter or reverse any decrees, orders or acts of the vice warden. The judgments of the lord warden must be transmitted to the Court of the vice warden, to be carried into effect, and are subject to an appeal to the House of Lords.

The courts of law held before the stewards of the respective Stannaries are now held before the vice warden, who thus exercises both an equitable and a legal jurisdiction. The latter jurisdiction is also extended to all the other mines, metals and minerals just mentioned. An appeal may be made to the lord warden, in the same manner and subject to the same final appeal as in equitable cases. But no appeal in any case is allowed where the debt or damage does not exceed 20*l.*, without question of jurisdiction or custom (*u*).

The extended jurisdiction of the Stannary Courts over the county of Devon was considered not to interfere with the jurisdiction of the Court of Chancery over mines in that county. A petition for winding up a mining company of that county in Chancery was granted by that Court under 20 & 21 Vict. c. 78, s. 12, now repealed, on the ground that the Stannaries Court has no jurisdiction to restrain proceedings at law against individual shareholders (*v*).

But the law is now altered by the Companies Act, 1862, which contains special provisions with respect to the Stannaries. The proper Court for winding up mining companies within the Stannaries is the Court of the Vice-Warden, unless he certifies, that in his opinion the company would be more advantageously wound up in the Court of Chancery.

A company was formed for purchasing and working a

(*u*) 18 Vict. c. 32, s. 26.

(*v*) Re South Lady Bertha Copper Mining Company, 16 C. B., N. S. 245; 32 L. J., Ch. 92.

mine in Cornwall, and was registered under this act in the registry office of the Stannaries Court—but its registered office was in London, and it never began business. It was held to be "engaged in working" a mine within the meaning of the 81st section of the act, and the proper jurisdiction for winding it up was adjudged to be in the Stannaries Court (*w*).

Under the 35th section, which provides for the rectification of the register, the jurisdiction is concurrent with that of the Superior Courts of Law or Equity (*x*).

Section III.

THE FOREST OF DEAN.

The *coal* and *iron* mines of the Forest of Dean, in the county of Gloucester, belonging to the crown, have also hitherto been subject to the operation of peculiar laws and customs, the precise history of which it may be difficult to trace, but which distinctly betray an origin common to all the mining customs of this country. The customs of the Forest of Dean, seem, however, to have been ascertained by the mine-law Courts, with very little precision, to have been subject to much uncertainty and perpetual variation, and to have fostered both a ruinous spirit of rivalry and an endless course of expensive litigation, naturally consequent upon a most imperfect system, and upon those causes which have, in all customary districts, so strongly impeded the advances of the intelligent and enterprising adventurer. As in Derbyshire, the customs of the Forest proved quite inadequate to meet the difficulties encountered in a more extensive scale of operations, and occasioned by the necessity for a uniform and more comprehensive system of management. The respective rights of

(*w*) Re The East Botallack Consolidated Mining Company (Limited), 34 Beav. 82; 34 L. J., Ch. 81. See Chap. X.

(*x*) Re Penhale and Lomax Consolidated Silver Lead Mining Company, Ex parte Atter, MS., March 20, 1867 (Lords Justices).

different proprietors and claimants also became very embarrassing to the true interests of the district. The productiveness and value of these mines have recently depended upon more enlarged and costly experiments than those originally contemplated by the settled customs, but very slender protection was afforded to the adventurer for securing to him the undisturbed prosecution of his enterprise.

A remedy, however, has been provided for these evils by a recent statute (*v*). All male persons born and abiding within the hundred of St. Briavels, of the age of twenty-one, who shall have worked a year and a day in a coal or iron mine within the hundred, are declared to be free miners. The same rule is applied to all quarrymen with respect to the stone quarries. All free miners are to have the exclusive right of having *gales* or grants made to them, which may be sold, devised or disposed of to any persons whomsoever.

An award was made, under the act, which defined the customs and the rights of all persons interested in the mines of coal and iron, assigning bounds to each gale or work, and laying down rules for the future working of mines and quarries. Several other provisions are inserted in the act itself for fixing the royalties payable to the crown, the rules to be observed in making future grants, and for various other purposes. The miners are liable to pay damages to the owners of all enclosed lands for injuries committed to the surface. No engines or dwelling-houses can be erected on these lands without the consent of the owners. All local customs have ceased to exist, subject to an appeal to the Privy Council. The act also contains excellent provisions, requiring the registry of all grants and conveyances, and of all the free miners of the Forest.

This act has been amended by another act, 24 & 25 Vict. c. 40. The powers of the Commissioners of Woods

(*v*) 1 & 2 Vict. c. 43.

and Forests are extended to the opening of pits and levels for any purpose, and all rights of outstroke and other easements may be exercised in the waste lands and in the inclosed lands of the crown. Compensation for surface damage may be awarded in gross or by annual payment.

A claim was made by the lords of the small adjoining manor of Blakeney, as woodwards or foresters of the crown in Blakeney walk, to grant gales or licenses for quarries within that part of the Forest of Dean, and to exact gale fees and rents. The claim was alleged to be within the saving clause of the principal act. But that clause was held to apply only to the old free miners in respect of this claim, and these had been, as a body, abolished. It was also held, that the claim could only have been brought within the saving clause by showing that the claimants were really the woodwards or foresters of Blakeney walk, that the office was annexed to the manor, and that it was so annexed by a grant of Edward III. On all these points the claimants were held to have failed. It was also held, that they could not under any circumstances have granted to the free miners a right to take the soil of the crown without limit, and without accounting for the profits; and that such a right could not be claimed by custom, for such a custom would be invalid; nor by prescription, for a prescription must be both reasonable and certain; nor by any evidence of a lost grant, for the grant of an unreasonable claim before legal memory can still less be presumed than since that period (*w*).

It has been decided, that certain rents may be reserved in respect of coal not actually worked (*x*).

It has also been decided, that the compensation clause for "surface damage" does not extend to injury to buildings on the lands occasioned by subsidence resulting from underground workings. Such injuries were not considered to be within the jurisdiction of the gaveller, as there was no power in the act to enable the free miners to leave the

(*w*) The Att. Gen. *v.* Mathias, 27 L. J., Ch. 761. See Chap. II.

(*x*) Seymour (Lord) *v.* Morrell, Q. B., May, 1851.

soil without support, nor any clause from which any such license could be inferred, and they would, therefore, be liable to an action for any such subsidence (*y*).

By one of the rules established by the award, any underlying veins, not "galed," might be galed to other parties, but to be so worked as not to impede or injure the working of the tracts already allotted or thereafter to be allotted or galed. It was held, that the Crown had the power, under this rule, of granting to subsequent galees a right to sink a shaft through the upper beds of coal previously galed, that the reservation must not be rendered nugatory by the restriction, and, therefore, that the condition only affected the mode of working the lower seams, when reached, and did not limit the right to reach the lower through the upper beds (*z*). This decision was confirmed by the Court of Appeal.

Mining customs, similar to those of Derbyshire, seem formerly to have existed in the Mendip hills, in Somersetshire, where lead ore was extensively produced (*a*). But, as the lead mines have not been worked there for two centuries, the customs are extinct. The lead recently produced from that district is procured from the refuse heaps of the old mines. Original mining works are projected.

By a recent statute, all local and customary measures are abolished; and any person selling by any but imperial measures is liable to a penalty of forty shillings for every sale. But the act is declared not to apply to the sale of any articles in any vessel which is not represented to contain any amount of imperial measure, or of any fixed, local or customary measure, in previous use. Heaped measures are also abolished, and all articles are directed to be sold by weight avoirdupois, viz., the stone—fourteen

(*y*) Allaway *v.* Wagstaff, 4 Hurl. & N. 307, 681; 29 L. J., Exch. 51.

(*z*) Goold *v.* The Great Western Deep Coal Comp., 11 Jur., N. S., Ch. 865.

(*a*) Pettus on Royal Mines, p. 82; Houghton's Compleat Miner, 1687.

pounds; the cwt.—eight stones; the ton—twenty cwt. All weights and measures within the act must be properly stamped (*b*).

A local custom for measuring coals exercised by a corporation, is not converted, by the operation of this act, into a right to weigh them (*c*).

In closing this treatise, a few words may be said with respect to mining courts and mining codes. The great usefulness of the Stannary Courts is quite apparent (*d*). Mining questions may be there decided without the ruinous expense often entailed upon such contests in the ordinary courts, and by persons experienced in the character and nature of mining pursuits. By far the most serious disputes arising from mining transactions are those resulting from the relation of partnership. Mines are frequently held in very small, sometimes incredibly small, shares. The agent, the workman, the supplier of goods and materials, the purchaser of the produce, and the lord, may all be co-partners and adventurers in the same scheme. The simplest demand or liability may thus affect the whole parties. There may be a partnership deed. In small concerns it rarely happens that this precaution has been taken; and it must never be forgotten, in the history of mining, that the most fortunate enterprizes have often resulted from the most feeble efforts. But no partnership deed can preclude disputes, or the interposition of a Court of Equity, the great tribunal of all partnership transactions. In all but large concerns a just demand must often be waived, or the whole amount, and much more, lost in litigation. In either case, there is a denial of justice.

The local Courts now established throughout the country

(*b*) 5 & 6 Will. 4, c. 63. See Jones *v.* Giles, 23 L. J., Exch. 292; 10 Exch. Rep. 119.

(*c*) Smith *v.* Cartwright, 6 Exch. 927; 20 L. J., N. S., Exch. 401.

(*d*) See Procedure in the Court of the Vice Warden of the Stannaries, 1856.

afford means for settling many mining differences. The equitable jurisdiction lately given to these Courts, and so long recommended in this treatise, may often be made useful in small concerns. The payment of calls, the forfeiture and sale of shares, the liquidation of debts and of liabilities to creditors, and the winding up of small companies, might be accomplished with still greater effect.

It is also well worthy of consideration, whether some attempt should not be made to establish a general mining code. It has been seen in what manner the present mining laws have grown out of the general law. For the reasons already explained, there is no country, perhaps, in the world in which the rights of the adventurer come in more frequent collision with those of others. The registration of all grants and conveyances of mines and shares would, in itself, produce the suppression of all dormant claims, and afford full security to a purchaser. The special nature of the occupation may well demand some special legislation. The British mines are no longer in the condition of those of Athens, which Xenophon exhorted his countrymen to explore and work. On the contrary, the danger arises rather from undue development and premature exhaustion. The mining interests of this country are daily increasing in magnitude, and demand the establishment of well-digested laws for their enjoyment. He who discovers and brings to light the hidden harvests of the earth, not only promotes his own interests, but he confers a benefit upon the whole community; and he may justly demand such a system of law as may promote the encouragement of a rational spirit of adventure, and which may at once guide, protect and secure him in his difficult and precarious pursuits. On the other hand, it should not be forgotten, that the State also has a more permanent interest in its resources, and may be justified in exacting rules which may promote its present and future welfare.

APPENDIX.

I. Precedents in Conveyancing.
II. Local Customs.
III. Glossary.

Part I.

precedents in conveyancing.

No. 1.—*Power in a Settlement to grant Mining Leases.*

Provided also, and it is hereby further agreed and declared, that it shall be lawful for the said A. B., and after his decease for any person who shall by virtue of the limitations hereinbefore contained be in the actual possession of or entitled to the rents and profits of the hereditaments hereby granted and assured, if such person shall be of full age, and if not, then for the said (*trustees*) and the survivor of them, and the executors or administrators of such survivor, during any such minority, by any deed or deeds to grant, demise and lease all and every or any of the mines, quarries, veins, strata and seams of copper, lead, iron, coal, stone, clay and all other minerals whatsoever, unopened as well as opened, in, under or upon the said hereditaments and premises, together with any part of the same hereditaments which may be thought necessary or convenient to be held for buildings, roads or ways, or other purposes, with such mines or quarries, unto any person or persons, for any term of years not exceeding sixty years, to take effect in possession and not in reversion or by way of future interest, together with full liberty and authority to search for, work, win, take, use and dispose of all such ores and minerals as shall be found therein, and to sink and make shafts, pits, levels, drifts, trenches, airgates, waygates and watercourses, and to erect and use any smelting, refining or other furnaces or mills, fire, steam or other engines and machinery, workmen's and other houses, buildings, sheds or other conveniences, and to use all other lawful ways and means whatsoever, not only for finding, separating and cleansing any of the said minerals, but for converting any of them

For 60 years.

into a manufactured condition, and also to take and use sufficient ground-room, heap-room and pit-room for placing or manufacturing any of the said minerals, and for laying the waste, refuse or rubbish to be from time to time produced from the said mines and quarries, and also with full and free liberty to use, or to make and use all proper and convenient
Ways. railways and other ways for the carriage of materials and articles to such mines or quarries, and for the carriage and delivery of any of the said minerals with horses, carts, waggons and other carriages, and generally upon such terms and with such stipulations as shall be reasonable, usual or necessary for any of the purposes aforesaid, so that in every such lease there be reserved and made payable the best and most
Rent. improved yearly rent or rents, dues, duties or tolls that can be reasonably obtained for the same, without taking any fine, premium or foregift for the making thereof, and there be contained a power of re-entry for the nonpayment of the rent or rents, dues, duties or tolls thereby reserved, and so that the respective lessees duly execute counterparts of such leases, and enter into proper and reasonable covenants and agreements for the due payment of such rents, dues, duties or tolls, and for the working and management of the said mines, quarries and works.

No. 2.—*Exceptions of Mines in a Deed of Conveyance.*

Except and reserving unto the said A. B., his heirs and assigns, all and every the mines, veins, strata and seams of copper, lead, iron and coal, unopened as well as opened, in, under or upon the hereditaments hereby granted and assured, with full and free liberty and authority for the said A. B., his heirs and assigns, and his and their agents, workmen or servants, to search for, work, take and carry away the same for his and their own use and benefit, and to dig, sink, drive, make and use all such shafts, pits, levels, adits, airgates, watercourses and other works which may be required for winning and obtaining the said mines and minerals according to the most approved practice for the time being adopted in similar mines in the same district, and either with or without support to the surface; and also to appropriate and use any part of the lands hereby granted and assured, either underground or on the surface, as may be proper as well for depositing and laying down the said minerals, and placing and heaping the waste, refuse and rubbish which may be worked along with them from time to time, as for washing and cleansing any of the said minerals, and for effectually separating them from all the soil and other substances mixed with them, and also for supplying such mines and works with water and with

good and fresh air, or for freeing the same from water or foul air, and for the purposes aforesaid to erect, make and employ all such fire, steam, water or other engines, buildings, workmen's houses, shops, crushing mills, sheds, hovels, machinery and works which may be proper and reasonable, and which are now or may be hereafter used for similar purposes, and also with full liberty and authority to construct or repair and use any railroads or other roads or ways which may be reasonably required for the effectual working and management of the said mines and works, or for the delivery of the said minerals: PROVIDED ALWAYS, that all such minerals which shall have been so produced shall be taken away from the lands hereby granted and assured within a reasonable period from the time of their production: PROVIDED ALSO, that the said A. B., his heirs and assigns, shall from time to time make compensation in money, equal to three times the amount of ordinary compensation, to the owners and occupiers for the time being of the said lands and premises hereby granted and assured, in respect of the injuries sustained by them in the prosecution of the mines and works aforesaid, whether such injuries be of a permanent or of a temporary nature; and such compensation shall apply as well to all buildings erected thereon after the day of the date of these presents as previously, and to all new improvements of the surface generally.

No. 3. —*Short Exception of Mines without Disturbance of the Surface.*

EXCEPT and reserving out of the conveyance hereby made all the mines and minerals whatsoever, unopened as well as opened, in or under the hereditaments hereby assured, with full liberty to search for, win, work and carry away the same, by means of outstroke or underground workings only, but not so as to interfere in any manner with the enjoyment of the surface of the said hereditaments, and with full liberty to make use of or employ any such underground workings for any purposes whatsoever: PROVIDED ALWAYS, that reasonable compensation be made from time to time for all injuries which may be sustained by the owners or occupiers for the time being of the said hereditaments by reason of the prosecution of the mines and works aforesaid.

No. 4.—*Agreement for a Lease of Mines.*

MEMORANDUM of agreement, made the 23rd day of January, 18 , between (*lessor*) of the one part, and (*lessee*) of the other part.

The said (*lessor*), for himself, his heirs and assigns, in con-

sideration of the rent, reservations, stipulations and agreements hereinafter contained, on the part of the said (*lessee*), his executors, administrators and assigns, to be paid and performed, doth hereby contract and agree with the said (*lessee*), his executors, administrators, and assigns, that he the said (*lessor*), his heirs or assigns, shall and will [with the consent and approbation of such parties as shall be necessary] on or before the seventh day of August now next ensuing, or at any time afterwards, upon the request in writing of the said (*lessee*), his executors, administrators or assigns, grant and deliver unto the said (*lessee*), his executors, administrators or assigns, a good and valid demise or lease of ALL, &c. [*The parcels, habendum and reddendum may be in the forms usually contained in leases*]: AND the said (*lessee*), for himself, his heirs, executors and administrators, doth hereby covenant and agree, with the said (*lessor*), his heirs and assigns, that he the said (*lessee*), his executors, administrators and assigns, shall and will accept the said demise or lease when so granted as aforesaid, and execute a counterpart thereof, when required by the said (*lessor*), his heirs or assigns, and pay one-half of the costs and charges attending the preparation and execution, as well of such lease and counterpart as of this present agreement and duplicate hereof: AND it is hereby declared and agreed, that there shall be contained in the said lease the following covenants, provisoes and agreements on the part of the said (*lessee*), his executors, administrators and assigns, that is to say, &c. [*Here insert the clauses applicable to the particular description of lease intended to be granted, including the clause of re-entry, or a concise and accurate summary of them. If the lessor is the owner of a large mining district, and is in the habit of granting leases according to a regular system, it may often be sufficient to dispense with many or all of these clauses, except where they may require to be varied by particular stipulation, and merely to express that*] "The said lease shall contain all such other covenants, clauses, provisoes and agreements on the part of the said (*lessee*), his executors, administrators and assigns, as are usually inserted in leases of a like nature now granted of the mines of the said (*lessor*), within the said manor" [*In like manner reference may be made to the usage of a district*]: AND it is hereby further agreed and declared, that the said lease shall contain on the part of the said (*lessor*), his heirs and assigns, proper covenants for title, for quite enjoyment, and for further assurance; and also that it shall be lawful for the said (*lessee*), his executors, administrators and assigns, upon payment and performance of the rents, covenants and agreements on his and their part hereinbefore mentioned or referred to, to remove and take away within twelve months after the determination of the said

Covenants by the lessee.

Covenants by the lessor.

term all the machinery, implements of mining and other materials used for the purposes aforesaid, and legally removable by a tenant, unless the same shall have been purchased by the said (*lessor*), his heirs or assigns: PROVIDED ALWAYS, and it is hereby further declared and agreed, that until such lease shall be so granted as aforesaid, the said (*lessee*), his executors, administrators and assigns, shall enter upon, work and occupy the said mine or vein and premises hereby agreed to be demised, subject to the covenants, reservations, provisoes and agreements hereinbefore mentioned or referred to on his or their parts to be paid and performed, as fully as if such lease had been actually executed and accepted, but that in case the said (*lessee*), his executors, administrators or assigns, shall not from time to time observe and perform such covenants, reservations, provisoes and agreements, then it shall be lawful for the said (*lessor*), his heirs and assigns, to re-enter into and upon the said mine or vein and premises hereby agreed to be demised, and the same to repossess and enjoy as in his and their former estate, freed and discharged from this present agreement, and all actions, suits, claims and demands whatsoever in respect thereof; and all the estate or interest hereby agreed to be granted to the said (*lessee*), his executors, administrators or assigns, shall absolutely cease and determine, both at law and in equity, but without prejudice to any legal or equitable remedies which may accrue to the said (*lessor*), his heirs and assigns, by reason of the nonobservance or nonperformance of any of the covenants, provisoes and agreements herein contained, either before or after such determination. IN WITNESS, &c. (I).

Proviso for re-entry.

No. 5.—*Short Agreement by an Agent to authorize a Trial for a short Period.*

MEMORANDUM that A. B., of, &c., on the behalf of the Duke of C., doth hereby agree to give full, exclusive and irrevocable license and authority to W. C. and W. B. for twelve months now next ensuing to work and pursue all that vein, or part of a vein, situate in an allotment or plot of ground on Blagill Fell, now in the occupation of T. B., for the space of one thousand two hundred yards in length and twenty-five

(I) In districts belonging to one proprietor, and in which mining grants are taken in pursuance of a uniform mode of management, it may be useful, and particularly in adventures of incipient or doubtful value, to prepare an actual lease containing all the clauses usually adopted, which might be deposited among the records of the manor, or elsewhere, and be specially referred to in agreements and instruments which are intended to embrace the same terms.

yards in breadth, commencing at a point now marked out and distant about one hundred and twenty-five yards from the east wall of the said allotment, and from thence extending eastward; and also to work and pursue within the limits aforesaid any other veins or parts of veins which may be discovered or intersected, except such parts thereof as may be then previously demised or authorized to be worked, upon the following terms, that is to say, That such trial or search shall be commenced within a month from the date hereof, and be thenceforth proceeded with regularly by at least two able and sufficient miners daily, upon the average of the whole period; that the said W. C. and W. B., or their agent, shall at all times give a correct account of the state of such trial to the said (*agent*), or to other agents of the said duke, when thereto required; that one full ninth part or share of all the lead or other ore produced, well washed and fit for smelting, shall be regularly rendered to the said duke or his agents; that all the ore produced which shall belong to other persons shall be wholly rendered to such persons in its natural and unwashed state; that in all other respects the usual terms and conditions contained in leases granted by the said duke in the same manor be observed and kept by the said W. C. and W. B.; and that upon nonobservance of any of the above terms this agreement shall be absolutely void and forfeited. As witness our hands this first day of May, 18 .

No. 6.—*Lease of Lead Mines.*

[*This form may be used for* COPPER *and any other metallic mines worked in veins.*]

THIS INDENTURE, made the 1st day of November, 18 , between (*lessor*) of the one part, and (*lessees*) of the other part, WITNESSETH, that in consideration of the rents, reservations, covenants, provisoes and agreements hereinafter contained, and on the part of the said (*lessees*), their executors, administrators and assigns, to be paid, observed and performed, He the said (*lessor*) (so far as the grant hereinafter contained is not included in, or does not interfere with any former and similar grants by the said (*lessor*) or any former owner) doth by these presents grant and demise unto the said (*lessees*), their executors, administrators and assigns, ALL [*Describe the veins or ground correctly, and, if necessary, by reference to a plan. If a vein be demised, describe its* supposed *direction, the length from a given point, and the breadth intended to be granted, and any other particulars*], Together with all and singular houses, buildings, shafts, sumps, levels, drifts, works, ways, waters, watercourses, pri-

Parcels.

vileges and appurtenances to the same now belonging, or therewith occupied and enjoyed; and also, together with full and free liberty for the said (*lessees*), their executors, administrators and assigns, and their agents and workmen, in and upon any lands in which the said mines and premises hereby demised shall be situate (but so far only as the said (*lessor*) may lawfully authorize the said (*lessees*) for this purpose), to dig, sink, drive, make and use all such pits, shafts, sumps, levels, watercourses and other works (except for hushing), which may be necessary for winning, working and obtaining the lead ores therein contained; and also to appropriate and use such part of the said lands either underground or on the surface, as may be proper and requisite as well for depositing and laying down the said ores, and placing and heaping the waste, refuse and rubbish, which may be worked along with them from time to time; as for washing and cleansing the said ores, and for effectually separating them from all the soil and other substances mixed with them, and also for supplying the said mines and works with water, or with good and fresh air, or for freeing the same from water or foul air, and for the purposes aforesaid, to erect, make and employ all such fire, steam, water or other engines, buildings, workmen's houses, shops, crushing mills, sheds or hovels, machinery and works which may be proper and reasonable; and also with full liberty and power to use and repair any railroads, or other roads or ways already made, which may lead to the mines and premises hereby demised, and to construct, repair and use any new railroads, or other roads or ways, which may from time to time, during the continuance of this demise, be proper and necessary for the effectual working and management of the said mines and premises hereby demised; and also with full liberty at all proper times to enter into the mines hereby excepted, with workmen and servants, for the purpose of examining the same: EXCEPT and always reserved unto the said (*lessor*), his heirs and assigns, his and their agents and workmen, full and free liberty at all proper and seasonable times, during the continuance of this demise, to enter into and upon the mines, works and premises hereby demised, in order to view and examine the condition thereof, and for that purpose to make use of any of the railroads, or other roads and ways, machinery and works belonging to the said mines and premises; and also to use or to make and use any drifts, levels, watercourses, adits or passages now being or hereafter to be in or upon any part of the premises hereby demised, or the surface thereof, for the purpose of freeing any other mines whatsoever from water, or for conducting water for the use of any such last-mentioned mines or the machinery or works connected therewith, or for supplying the same with good fresh air; and also full and free liberty,

Powers and liberties.

Exceptions.

To enter.

To work adjoining mines.

at all times during the continuance of this demise, to make any level, drift, shaft, adit, watercourses, railroads, and other roads or ways in or upon any parts of the premises hereby demised, or the surface thereof, for effectually winning or working any adjoining mines: PROVIDED ALWAYS, that the said (*lessor*), his heirs, assigns, or his or their agents and workmen, shall not by any of the means aforesaid obstruct or destroy any of the levels, drifts, shafts, adits, watercourses, railroads, and other roads or ways, and works belonging to the said mines and premises hereby demised, and in actual use; and shall not molest nor delay in the regular and necessary use thereof in the meantime the workmen and servants of the said lessees or lessee for the time being; and shall not on any account whatever divert or use for any purposes whatsoever any water which may be from time to time enjoyed with the said mines and premises hereby demised, and which may at any time, either then or thereafter, be only adequate for the proper and effectual working and washing of the mines and minerals hereby demised; and shall contribute a fair and proportionate share of the costs and expenses incurred in repairing any parts of such works which may be jointly used by the said (*lessor*), his heirs or assigns, and the said lessees or lessee for the time being; and shall also, from time to time, deliver to the said lessees or lessee for the time being, their agents or servants, all the lead ores which shall be obtained in or upon the said premises hereby demised, during any such operations connected with any adjoining mines in their natural and unwashed condition, and to be laid upon some part of the said premises for the acceptance of the said lessees or lessee, subject to the like render as the ores raised by them or him; and shall also, in the course of all such last-mentioned operations, make, from time to time, all reasonable satisfaction in damages for any injury which may be sustained by the said lessees or lessee in respect of the said mines, works and premises hereby demised: PROVIDED ALSO, that the said (*lessor*), his heirs or assigns, shall not attempt to win or work any of the minerals hereby excepted, which shall be immediately connected with the vein or veins hereby demised, or with the actual mining works for the time being of the said lessees or lessee, without their or his consent in writing first obtained: PROVIDED NEVERTHELESS, that the said lessees or lessee shall, at the request of the said (*lessor*), his heirs or assigns, bring out to the surface all such excepted minerals as shall be actually severed by the said lessees or lessee in the course of their or his mining operations without any compensation, and shall permit the said (*lessor*), his heirs or assigns, at any time afterwards, to carry away the same for his and their own benefit: TO HAVE AND TO HOLD the said mines, veins, and all and singular other the

But not to obstruct the mines demised.

Or divert water.

Proportion of costs.

Deliver ore found.

Damages.

Habendum.

premises hereinbefore mentioned, and hereby demised, with their appurtenances, except as aforesaid, unto the said (*lessees*), their executors, administrators and assigns, from the 1st day of January now last past, for and during the full term of forty-two years, from thence next ensuing, and fully to be complete and ended: RENDERING AND DELIVERING therefore unto the said (*lessor*), his heirs and assigns, yearly and every year during the said term, one full part or share of all and every the lead ore, to be from time to time produced and obtained by the said lessees or lessee for the time being, from or out of the mines and premises hereby demised, well and sufficiently washed, cleansed and made fit for smelting, according to the best and most improved mode practised within the said manor, free and clear from all rates, taxes and assessments imposed, or be imposed, by authority of parliament or otherwise, upon the whole or any part of such produce, and all other charges and deductions whatsoever relating thereto, and to be weighed and delivered in the manner hereinafter mentioned (I): AND the said (*lessees*) for themselves their heirs, executors, administrators, and assigns do, and each of them doth, by these presents, jointly and severally covenant, promise and agree with and to the said

Reddendum.

Covenants by lessees,

(I) VARIATION of reddendum, for avoiding the rates for lead mines:—

RENDERING, &c. for all lead ore (including the silver therein) to be so produced as aforesaid the yearly sum or sums following; (that is to say,) when the average yearly market price of smelted pig lead of every kind and quality arising from mines within the counties of , and sold at , shall amount to the sum of £ sterling for a fother of lead containing twenty-one hundredweight, then at the rate of for every bing of lead ore, each containing eight hundredweight, produced from the mines hereby demised, and made fit for smelting; and when such average market price shall exceed the said sum of £ per fother, then at the rate aforesaid, with a further sum of for every additional sum of £1, by which such price shall so exceed, for every such bing, and in proportion for any less sum than £1; and when such average price shall be less than the said sum of £ per fother, then the said sum of reserved as aforesaid shall be subject to a deduction therefrom of the same amount and in manner last aforesaid: *And* such sums hereby reserved shall be payable on the 1st day of February in every year, and shall be computed in each case with respect to the ores produced in the year immediately preceding, and ending on the 1st day of November, and with reference to the average market price for such last-mentioned year.

(*lessor*), his heirs and assigns, in manner following, that is to say, that they the said (*lessees*), their executors, administrators or assigns, or their agents or workmen, shall and will, from time to time, and at all times during the said term of forty-two years, well and truly render and deliver unto the said (*lessor*), his heirs or assigns, his or their agents or servants, one full part or share of all and every the lead ore, to be from time to time produced and obtained by the said lessees or lessee for the time being, from or out of the said mines and premises hereby demised, in manner aforesaid, according to the true intent and meaning of these presents: *And also* shall and will well and truly weigh, or cause to be weighed, upon some part of the said demised premises, the whole produce of such ore to be so obtained as aforesaid: *And also* that the weights, beams and scales which shall be used upon or near to the premises hereby demised for the weighing of any such produce, either in receiving the same from the workmen, or in delivering the same for smelting or for sale, or by way of reservation as aforesaid, or for any other purpose whatsoever, shall be either the same or of similar construction, size and form, and in all respects fair and equal; and that the weighing of the said part or share hereinbefore reserved shall be performed at lease twice in every year during the said term, and as many other times as occasion shall require; and that ten days' notice in writing of every weighing of the said part or share shall be given by the said lessees or lessee for the time being, or their or his agent to the said (*lessor*), his heirs or assigns, or his or their agents, in order that he or they may be present at such weighing, and attend to the proper conduct thereof: *And also* that no part of the said produce shall, on any account whatsoever, be taken away from the said demised premises by the said lessees or lessee for the time being, their agents or workmen, until it shall have been so weighed as aforesaid, and until the duty in respect thereof has been so rendered as aforesaid: *And also* that it shall be lawful for the said (*lessor*), his heirs and assigns, from time to time to distrain the ores and materials of the said lessees or lessee for the time being in, under or upon any part of the premises hereby demised, for or in respect of any dues or duties which ought to have been rendered to the said (*lessor*), his heirs or assigns, and to weigh the same in the manner hereinbefore mentioned, and after deducting his and their fair proportion to leave the same in some part of the said premises for the use of the said lessees or lessee for the time being: *And also* that they the said lessees or lessee for the time being, their or his agents, shall and will, once in every year of the said term, and at such period in every year as the said (*lessor*), his heirs or assigns, his or their agents, shall determine, make and deliver unto the said (*lessor*), his

for the payment of rent.

To weigh the ore.

Weights and scales.

Lessor may distrain.

Deliver accounts.

heirs or assigns, his or their agents, a full, true and just account in writing, and signed by the said lessees or lessee for the time being, or their or his agent, of the quantity of lead ore yearly washed, weighed and produced from the mines and premises hereby demised, and also of the quantity of such ore yearly carried away from the said mines and premises, either by the said (*lessor*), his heirs or assigns, or his or their agents, or by any other persons whomsoever: *And also* shall and will at all times, during the continuance of this demise, prepare and keep a correct and proper plan or section of all the workings and actual condition of the mines and premises hereby demised: *And also* shall and will, at all times during the said term, permit and suffer the said (*lessor*), his heirs or assigns, and his or their agents, to inspect, peruse and take copies of, or extracts from, all and every the books, memorandums and accounts, which shall be kept at any time during the said term, for entering or recording the quantity of ore so raised or so carried away as aforesaid, and the said plans or sections: *And also* that it shall and may be lawful for the said (*lessor*), his heirs or assigns, or his or their agents, to inspect and take an account in writing, from time to time, of all the ore which shall be so respectively produced and carried away as aforesaid: *And also* that they the said lessees or lessee for the time being, their and his agents, workmen and servants, shall and will, during the continuance of this demise, work and carry on the said mines and premises in a fair, orderly, skilful and workmanlike manner: *And also* shall and will, for at least nine calendar months in the whole in every year during the continuance of this demise, constantly employ, during all the usual times and hours of working mines within the said manor, in working and carrying on the said mines, at least four good, able and sufficient miners or workmen, unless prevented by some inevitable accident or occurrence: *And also* that it shall be lawful for the said (*lessor*), his heirs and assigns, or his or their agents, at all proper and seasonable times during the continuance of this demise, and whether the mines are working or not, without any interruption or disturbance from the said lessees or lessee for the time being, their or his agents, workmen or servants, to enter into and upon the mines, works and premises hereby demised, or any part thereof, to view and examine the condition thereof, and whether the said mine be worked in a proper, skilful and workmanlike manner, and for such purposes to make use of any of the railroads, or other roads or ways, machinery and works belonging to the said mines and premises: *And also* shall not nor will, at any time during the said term, hush any earth for discovering or obtaining any ore without the express licence or consent in writing of the said (*lessor*), his heirs or assigns, his or their agent,

Plan and section of mines.

To inspect accounts and make extracts.

For properly working the mines.

Nine months in the year.

Lessor may enter.

Lessees not to hush.

Nor leave refuse near running water.

for every such purpose: *And also* shall not nor will at any time, during the continuance of this demise, place or leave any waste or dead heaps, refuse or rubbish, which may be brought out of the said mines or premises, near to any river, brook or channel of water, whereby such waste, or dead heaps, refuse or rubbish may reasonably be supposed to be liable to be disturbed and carried away by floods or other natural causes: *And also* shall not nor will work the said mines hereby demised out of or beyond the limits and boundaries hereinbefore mentioned: *And also* shall and will place upon some convenient part of the said demised premises all such ores and minerals which shall have been worked by the said lessees or lessee for the time being, their workmen or servants, and which shall belong to any other mine owners upon and by virtue of any grant similar to these presents in an unwashed condition, and permit and suffer such last-mentioned owners, their servants and workmen, to carry away the same ores and minerals: *And also* shall and will, at all times during the continuance of this demise, make proper and reasonable compensation to the owners or occupiers of any land in respect of any damages which may be sustained by them by the working of the said mines, and the carrying on the said works, or in taking away the said ore, or by any other means connected therewith: *And also* shall and will build and keep in good repair a sufficient and substantial stone wall or other fence around all the pits and shafts which may at any time during the said term be open in any part of the said demised premises or elsewhere for the purposes of this demise, so as effectually to prevent all access thereto by all kinds of cattle (except sheep); and when and so often as any such pit or shaft shall be considered by the said (*lessee*), his heirs or assigns, or his or their agents, and also by the said lessees or lessee for the time being, their or his agents, to have become entirely unnecessary, shall and will either fill up the same with earth or waste heaps, or cover the same with a good and sufficient arch of stone: *And also* shall and will, at all times hereafter, keep harmless and indemnified the said (*lessor*), his heirs and assigns, his and their agents and servants, of and from all and all manner of suits, actions and proceedings which may be instituted against them or any of them for or in respect of any injuries sustained by breach of any of the covenants and provisoes herein contained on the part of the said lessees, and all costs, charges and expenses in anywise relating thereto: *And also* shall and will, at all times during the continuance of this demise keep and preserve the said mines and premises from all unnecessary injury and damage, and also all the levels, drifts, shafts, pits, sumps, watercourses, houses, erections, sheds, washing places, buddles and other conveniences, railroads, and other roads and ways

Nor work out of limits.

Other ores.

Pay damages.

Fence pits.

Injuries.

Keep the mines in good order,

in good order, repair and condition, except such of the said works as shall from time to time be considered by the said (*lessor*), his heirs or assigns, his or their agents, to be unnecessary for the further working of the said mine, or for any purposes connected with the working of any other mines, and in such state and condition shall and will, at the end or other sooner determination of the said term, deliver peaceable possession thereof, and of all and singular the premises hereby demised, to the said (*lessor*), his heirs and assigns: [*And also* shall not nor will at any time during the said term sublet or dispose of the said mines and premises hereby demised, or any part thereof, for less than the whole term hereby granted by way of underlease or other separate interest: *And also*, in case the said mines hereby demised shall at any time during the said term be carried on in copartnership with any other person or persons, shall and will on the 1st day of May in every year, when so required by the said (*lessor*), his heirs or assigns, deliver to him or them, or his or their agent, a correct list and description in writing of the persons interested therein as such copartners for the time being or as claiming to be copartners therein: *And also* shall and will in case of any such copartnership as aforesaid procure all the copartners for the time being to enter into and subscribe articles of agreement or rules defining the terms on which such partnership is constituted, and in particular containing a stipulation to the effect that in case any call or contribution to be made on any of the said copartners shall remain unpaid for the space of three calendar months from the time of proposed payment, the share and interest of such partner so failing may be forfeited, and shall and will deliver a copy of all such articles or rules to the said (*lessor*), his heirs or assigns, or his or their agent: *And also* shall and will duly enforce such stipulation to the effect aforesaid against all or any of the partners so failing to pay any such call or contribution: PROVIDED ALWAYS that no covenant or clause herein contained shall operate to oblige the said (*lessor*), his heirs or assigns, for any of the purposes of these presents to acknowledge any person or persons as interested in the mines and premises hereby demised, other than the person or persons for the time being legally entitled thereto under this demise, without reference to any equitable claims thereto:] PROVIDED ALWAYS, and it is hereby mutually declared and agreed between and by the parties to these presents, that if the said (*lessor*), his heirs or assigns, or his or their agents or servants, shall, after such notice of ten days as aforesaid, neglect or refuse to attend and be present at any weighing of the said lead or other ore, for the purpose of ascertaining the amount of duty ore so payable as aforesaid, then and in every such case it shall be lawful for the said lessees or lessee for the

and so deliver them up.

Not to sublet.

To furnish names of copartners.

And to procure partnership articles.

To enforce calls or forfeiture.

Lessor need not acknowledge co-partners.

Lessor neglecting to be present at weighing.

time being, their or his agents or servants, in the presence of two credible and indifferent witnesses, to weigh, divide and apportion all and every the ore so produced and prepared as aforesaid, and to set apart and keep safely on behalf of the said (*lessor*), his heirs and assigns, in some convenient part of the premises hereby demised, or as near thereto as circumstances will permit, the said full share and proportion of the said (*lessor*), his heirs or assigns, until the same shall be so removed and carried away by him or them, but the said lessees or lessee for the time being, their or his agents or workmen, shall, on no account, be responsible for the safe custody of the said part or share for more than six calendar months: PROVIDED ALSO, and it is hereby further declared and agreed, that the said (*lessor*), his heirs or assigns, shall upon the determination of the said term, and within six months afterwards, have the option of purchasing all or any parts of the engines, machinery, mining tools and instruments, and other articles belonging to the said mines and premises hereby demised, and which are legally removable by a tenant at a valuation to be made in the manner hereinafter mentioned: And if the said (*lessor*), his heirs or assigns, shall, within such period as aforesaid, decline or neglect to purchase all or any part of such engines, machinery, tools, instruments and articles as aforesaid, then that it shall be lawful for them, the said lessees or lessee for the time being, within twelve calendar months next after the determination of the said term, to remove, take up and carry away the same for their own use and benefit without any claim or disturbance by the said (*lessor*), his heirs or assigns: *And also*, that upon such determination as aforesaid, it shall be lawful for the said lessees or lessee for the time being, within the space of twelve months then next ensuing, to wash, crush, and remove and take away the ores which shall have been produced by them or him during any part of the said term, upon rendering to the said (*lessor*), his heirs and assigns, the full amount of his or their dues in the manner hereinbefore mentioned: PROVIDED ALSO, and it is hereby expressly agreed and declared, that if the said lessees or lessee for the time being shall, at any time during the continuance of this demise, refuse or neglect to observe and perform all or any of the conditions, covenants and provisoes hereinbefore on their parts contained, then and in any such case the said term hereby granted shall cease, determine and be void, anything herein contained to the contrary thereof in any wise notwithstanding; and it shall be lawful for the said (*lessor*), his heirs, assigns, or his or their agents, to enter forthwith in and upon the said demised premises, and the same to repossess and enjoy as fully and effectually as if these presents had not been made and executed, without prejudice to the right of the

Election to purchase machinery and tools.

If not, lessee to take them away,

and the ore.

Proviso for re-entry.

said (*lessor*) to enforce payment of any rent then due, or the performance of any covenants which shall be then broken or unperformed, or to be performed after the expiration of the said term (*a*): AND the said (*lessor*) for himself, his heirs, executors, administrators and assigns, doth covenant, promise and agree with and to the said (*lessees*), their executors, administrators and assigns, by these presents, in manner following, that is to say, that for and notwithstanding any act, deed, matter or thing whatsoever, by him the said (*lessor*) made, done, omitted, committed, or knowingly, or wilfully suffered to the contrary, he the said (*lessor*) now hath in himself good right, full power and authority to grant and demise the said mines and premises hereby demised, with their appurtenances, in manner aforesaid, according to the true intent and meaning of these presents (save and except only in respect of any former grants which may have been at any time heretofore made of the said mines and premises, or any part thereof, for any of the purposes hereinbefore mentioned): *And* that it shall be lawful for the said lessees or lessee for the time being, at all times hereafter during the continuance of this demise, paying and performing the rents, reservations, covenants, provisoes and agreements hereinbefore on their part respectively contained, peaceably and quietly to possess and enjoy the same mines and premises with their appurtenances, and to work and carry on the same in the manner hereinbefore mentioned for their own use and benefit without any disturbance, claim or demand whatever from or by him the said (*lessor*), or his heirs, or any persons lawfully claiming through or in trust for him, them or any of them: *And* that free and clear, and well and sufficiently defended and indemnified by the said (*lessor*), his heirs, executors and administrators, from and against all other estates, titles, debts and incumbrances whatsoever, either already or to be hereafter made, occasioned or suffered by the said (*lessor*) or his heirs, or any other persons lawfully claiming or to claim as aforesaid (save and except as aforesaid): *And further*, that the said (*lessor*), and his heirs, and all other persons having or claiming, or who shall or may hereafter have or claim, any estate or interest in the said mines and premises hereby demised, or any part thereof, under or in trust for him the said (*lessor*) or his heirs (except as aforesaid) shall and will, in the events aforesaid, from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges of the said lessees or lessee for the time being, make, do and execute, or cause to be made, done and executed, all such further and other lawful and reasonable acts, deeds, things, conveyances and assurances in the

Covenants of lessor for title.

For quiet possession.

Free from incumbrances.

For further assurance.

(*a*) As to covenants for title, see Chap. VIII.

law whatsoever, for the further, better and more perfectly granting and demising the said mines and premises, with their appurtenances, in manner aforesaid, according to the true intent and meaning of these presents, as by the said lessees or lessee for the time being, or their or his counsel in the law, shall be reasonably advised or required: PROVIDED LASTLY, that if at any time during the said term, or after the determination thereof, any doubt, dispute or difference shall arise between the said (*lessor*), his heirs or assigns, and the said lessees or lessee for the time being, concerning any of the clauses, covenants and agreements herein contained, or in anywise relating thereto, or any valuation to be made as aforesaid, or any other matter or thing whatsoever relating to the said mines and premises; then, and in all such cases, such doubt, dispute or difference shall be referred to the award or arbitration of such two persons as shall be nominated or appointed for that purpose by the parties in difference, one of the said arbitrators to be named by the said (*lessor*), his heirs or assigns, and the other of them by the said lessees or lessee for the time being; and such arbitrators shall, with all convenient speed, proceed to the determination and settlement of the matters in dispute, and shall either immediately appoint some third person to act as umpire, in case of ultimate difference between them, or to act immediately in conjunction with them, and such matters to be decided from time to time by a majority; or shall appoint such third person, when and in case such ultimate difference shall arise; and every such arbitration shall then proceed and be conducted in accordance with the enactments of the Common Law Procedure Act, 1854, in such cases made and provided, or any then subsisting statutory modification thereof; and the costs of any such arbitration and of the award and all expenses incidental thereto shall be in the discretion of the person or persons making such award. IN WITNESS, &c.

Arbitration clause.

No. 7.—*Lease of Coal Mines under a Power.*

[*This form may be used for* IRONSTONE *mines, and any mines made for working horizontal strata.*]

THIS INDENTURE, made the 23rd day of January, 18 , between (*lessor*) of the one part, and (*lessees*) of the other part: WHEREAS, by an indenture of settlement dated the 1st day of May, 18 , and made between, &c., all the lands and hereditaments hereinafter described, with the appurtenances, were (together with other hereditaments) conveyed and assured to the use of the said (*lessor*) and his assigns, for his life, with a limitation over to the use of trustees and

Recitals.

their heirs, during the life of the said (*lessor*), in trust for him and his assigns, and after his decease to and for the several other uses and purposes therein particularly expressed, with the ultimate reversion to the use of the said (*lessor*), his heirs and assigns for ever: And in the said indenture was contained a power enabling the said (*lessor*), and his assigns, during his life, by any indenture to be sealed and delivered by him or them in the presence of and attested by two witnesses, to limit and appoint, by way of demise or lease, all and every or any of the mines—[*Recite the power totidem verbis.*—See No. 1]: AND WHEREAS the said (*lessor*) has agreed to grant a lease of the mines of coal in the lands and hereditaments hereinafter described to the said (*lessees*) in the manner hereinafter expressed: AND WHEREAS the expression hereinafter contained, "*the lessor*," is intended to comprise as well the said (*lessor*) and his assigns as other the person or persons entitled after his decease for the time being to the rents and profits of the lands and hereditaments hereinafter described by virtue of the said recited indenture of settlement: *And* the expression "*the lessees or lessee*" is intended to comprise as well the said (*lessees*), and the survivors and survivor of them, as their or his assigns, and the executors or administrators of such survivor, unless the context shall be repugnant to such construction: NOW THIS INDENTURE WITNESSETH that, in pursuance of the said agreement, and in consideration of the rents, covenants and provisoes hereinafter reserved and contained, and on the part of the lessees or lessee, to be paid, observed and performed,—He, the (*lessor*), in pursuance and execution of the power or authority to him for this purpose limited or reserved as aforesaid, and of all other powers and authorities in anywise enabling him in this behalf, doth, by these presents, sealed and delivered by him in the presence of and attested by two witnesses, appoint, grant and demise unto the said (*lessees*), their executors, administrators and assigns, ALL those mines, seams or strata of coal, as well opened as not opened, called or known by the names of the six feet coal, the yard coal, the five feet coal, the seven feet coal, and the two feet coal, lying or being in or under all or any of the inclosed lands, situate within the manor of A., and which lands are hereinafter, for the sake of distinction, called lands A.: AND ALSO ALL those mines, seams or strata of coal, as well opened as not opened, respectively lying and being within and under ALL [*Describe the lands by special or general description*]: And which are further described in the plan hereon indorsed and distinguished therein by the colour : TOGETHER with full and free liberty (subject as hereinafter is mentioned) for the lessees or lessee to search for, win and work the said mines and premises hereby demised accord-

"Lessor" and "lessees' construed.

Appointment.

Parcels.

Liberties and powers.

ing to the most approved practice for the time being adopted in similar mines in the same district, and either with or without support to the surface, except as hereinafter mentioned, and to carry away and dispose of all the coals which may be so found and produced [and the coke made therefrom as hereinafter is mentioned], *And* for the purposes aforesaid to appropriate, repair and make use of all such pits, shafts, levels, drifts and other works as are now open or available, and to dig, sink, drive, make, repair and use all such pits, shafts, levels, drifts and other works which may be necessary or proper: *And also* to appropriate and use such parts of the said lands, either underground or on the surface, which may be reasonably required for depositing and keeping the said produce, and for heaping the earth, soil and other refuse substances procured therewith: *And also* to use and enjoy all the houses, cottages, sheds and other buildings heretofore occupied with the said mines hereby demised, and to erect and build, remove and again rebuild on any part of the said land any houses, cottages, sheds, buildings, engines, machinery, and other works: *And* to do all other things which shall from time to time be necessary or convenient for the effectual working of the said mines hereby demised [*and* to erect and make upon any part of the said lands, coloured in the said plan, any furnaces, ovens and other works for the conversion of the coal hereby demised into coke]: *And also* to use, or construct and use, upon any part of the said lands all such railroads and other roads or ways which may be proper or convenient for the enjoyment of the said mines, and for the sale and delivery of the produce thereof, and for the carriage of materials thereto: *And also* to use and make all such watercourses, airgates or passages which may be proper for supplying any part of the said mines and works with pure air and water, or for freeing the same from foul or unwholesome air and water, and to erect all adequate machinery and apparatus for such purposes: *And also* for any of the purposes of this demise, but not otherwise, to work, take and carry away any stone, clay and earth in or under the said lands, and to make bricks, tiles and other materials from such clay or earth, and *Together* with all such other usual and proper easements, rights, privileges and immunities as may be necessary or convenient for any of the purposes of these presents: *Provided always*, that previously to entering upon any part of the said lands for any of the aforesaid purposes, the lessees or lessee shall give one calendar month's notice thereof to the lessor or his agent, and also to the occupier for the time being of the lands so required: *Provided also*, that the tenants for the time being of the said lands shall be employed in winning and working such stone as shall be required, in preference to any other persons, at such rates or

Railroads.

Notice of entry.

Preference of tenants.

prices as are usually paid in the neighbourhood: *And together* with full and free liberty for the lessees or lessee for the time being to make, drive and use any passages or drifts by way of outstroke or instroke, not exceeding three in the whole, of such passages or drifts from, forth, through, into or out of the barrier hereinafter covenanted to be left unworked for the purpose of working and carrying away any coal or other minerals lying or being within or under any adjoining lands, and of working and carrying away the coal hereby demised through or over any such adjoining lands: *Provided* that each such drift or passage shall not exceed six feet in width (EXCEPTING and reserving out of this demise unto the lessor the right and liberty to have, use and enjoy, and to grant or demise to any other persons, full and free way, leave or right of way and passage with waggons, carts and any other carriages from or to any other mines whatsoever situate in the said lands or elsewhere, or from or to any other places whatsoever, and for any purposes whatsoever, in, through, over, across, under and along all and every or any of the waggon-ways or railways, and other roads or ways, now or hereafter to be made for any of the purposes of these presents, And also full power and authority to use and employ for the purpose of this exception or reservation all the fixed machinery, rails, articles and things belonging to the mines and premises hereby demised: *Provided always*, that the lessor, and other persons exercising any such rights, shall not substantially obstruct, prevent or prejudice the lessees or lessee in the enjoyment of the mines and premises hereby demised, and shall also pay to the lessees or lessee reasonable and proportionable compensation for and towards the making, supporting, replacing and repairing of the said waggon-ways, railways, and other roads or ways, machinery, rails, articles and things so used or enjoyed in common: *And also* excepting and reserving out of this demise to the lessor full and free liberty and power to stop and hinder any other persons, who are not authorized for that purpose, from using the same waggon-ways, railways and other roads or ways: *And also* excepting and reserving out of this demise unto the lessor and his tenants full and free liberty to lead or carry manure, lime or compost for the use of the said lands hereinbefore described, and also hay, corn, straw and other produce thereof, with horses, carts and other carriages, through or over any parts of the said lands, and over, along or across any waggon-ways, railways and other roads or ways, to be made or used by virtue of these presents, without paying any compensation for the same: *Provided* always, that as little interruption as possible be thereby given to the lessees or lessee in the prosecution of the mines and premises hereby

Outstrokes.

Exceptions of rights.

Habendum. demised) (I): To have and to hold the said mines, seams, strata, and all and singular the rights, liberties, powers, privi-

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Excepted wayleave confined to crossing.

(I) Variation.—*Excepting*, &c. full and free right, power and authority unto and for the lessor to have and enjoy or to grant and demise any way-leave or right of passage to any person or persons whomsoever for any purpose whatsoever [except the conveyance of coals] in, through, over and along the said lands or any part thereof, with liberty to make, lay and place any railways, waggon-ways or cart or other ways across and therewith to intersect, either upon the level or by passing over or under the same, the present or future railways and other ways hereby authorized to be used and made, and to pass and repass in, through, over and along the railways or other ways and crossings hereafter to be made by virtue of this present exception or reservation, and all such existing intersecting railways and other ways and crossings, with horses and other animals, engines, both stationary and locomotive, ropes and other machinery, carts, wains, waggons and all other carriages whatsoever, laden or unladen, but so as not to prejudice or damage the said present and future railways and other ways hereby authorized to be used or made otherwise than by crossing or intersecting the same, and so as in all such crossings thereof as little hindrance or interruption, as reasonably or conveniently may be, shall be given to the lessees or lessee, their or his agents, servants or workmen, and so as the places of and the works necessary for such crossings or intersections, both future and present, be respectively made and repaired and kept in good repair by and at the expense of the lessor, his grantees or lessees: And also, excepting, &c. unto the lessor and the occupiers for the time being of the said lands and their respective tenants, agents and servants, for the more convenient occupation, management and cultivation of their respective messuages, farms and lands (but not for any colliery or other purposes), full and free power and liberty to cross over the said present and future railways and other ways hereby authorized to be used and made by the lessees or lessee, on foot or on horseback, and with or without horses or other animals, carts, waggons or other carriages, laden or unladen, so that as little hindrance or interruption, as reasonably or conveniently may be, shall be thereby given to the lessees or lessee and their or his agents, servants or workmen, and so as the places of and works necessary for such crossings as last aforesaid, both present and future, be respectively made and repaired and kept in good repair by and at the expense of the person or persons so using the same.

leges and premises hereby appointed and demised unto the said (*lessees*), their executors, administrators and assigns from the 1st day of November now last past, for and during the full term of forty-two years, *Subject* to the rents, payments, provisoes, covenants and agreements hereinafter mentioned: RENDERING and paying therefore unto the lessor, his heirs and assigns, yearly and every year during the said term the certain yearly rent or sum of £ of lawful money of Great Britain, whether the said coal mines hereby demised shall be worked or not, to be paid by two equal half-yearly payments in every year, that is to say, on the first day of November and the first day of May in every year, the first payment thereof to be considered to have become due on the first day of November now last past: *For* and in respect of which said certain yearly rent of £ it shall be lawful for the lessees or lessee to win, work and carry away from, forth and out of the mines hereby demised such a quantity of coals as shall at the rate per ten [*or* per ton] hereinafter next mentioned produce the sum of £ : *And* if in any year or years they or he shall work less than such quantity, then they or he may work and carry away the deficiency in any succeeding year or years of the said term, without paying any tentale or other rents other than the said certain rent: *Provided always*, that he or they shall not work or carry away in any year, in respect of the said certain rent, more than such quantity as aforesaid, together with the deficiency (if any) of any preceding year or years: AND ALSO RENDERING and paying therefore unto the lessor yearly and every year during the said term in respect of all coals wrought and brought to bank from the said mines hereby demised, over and above such quantity as may be so worked in respect of such certain rent as aforesaid, the rent or sum of for every ten [*or*, ton] of such coals, *All* which last-mentioned additional rents shall be calculated and paid on the 1st day of November in every year: *Provided always*, that for the purposes of these presents, a ten of coals shall be considered as consisting of eighteen chaldrons and one-third of a chaldron of fifty-three hundredweight each: *Provided also*, that all the rents hereinbefore reserved shall in all cases be calculated upon the coals actually drawn to bank, And that a deduction of one-seventh part shall be made from all such coals in respect of the consumption required in carrying on the said mines and premises hereby demised, which shall not be liable to any rent whatsoever: *Provided also*, that the lessees or lessee shall not leave underground a greater quantity of the coals actually worked than eight parts per centum of the whole: *And* in case more than that quantity shall be so left, the surplus thereof shall be comprised in the quantity of coals liable to such rents as aforesaid, and shall become

Reddendum.

Certain rent.

Tentale or tonnage rents.

so liable in like manner as if it had been brought to bank: Outstroke rent. AND ALSO RENDERING and paying unto the lessor yearly and every year during the said term the sum of one shilling for and in respect of all the coals which shall be carried away by the lessees or lessee from the said mines and premises hereby demised, through or by means of any of the drifts or passages hereby authorized to be so used by way of outstroke or instroke as aforesaid: AND ALSO RENDERING and paying to the lessor the sum of for every ten [*or*, ton] of coals which shall be brought, drawn or carried away by the lessees or lessee from any adjoining mines by means of any such drifts or passages to be so used by way of outstroke or instroke as aforesaid, into or through the said lands hereinbefore described, or the said mines and premises hereby demised, and by means of the shafts or pits, and railways, or other roads or ways so authorized to be used as aforesaid (I): *All* which said rents hereby lastly reserved shall be calculated and paid on the first day of November in every year in which the same shall become due: ALL which said several rents and sums of money hereby reserved and made payable shall be paid without any deduction or abatement whatsoever for or on account of any parliamentary, parochial or other taxes,

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Variations. Market price. (I) VARIATIONS.—*Rendering*, &c. when the average market price for any such coals shall not exceed during any year of the said term the sum of per ton, then the rent or sum of for every ton of such coals for such year; and when such average market price shall exceed the sum of , then the rent or sum of for every such ton for such year.

Different kinds of coal. *Rendering*, &c. the sum of for and in respect of all the round coals brought to bank from the said mines, over and above, &c. the rent or sum of for every ton of twenty hundredweight, imperial measure of such coals, and the sum of for and in respect of all the small coals so brought to bank over and above, &c. the rent or sum of for every such ton of such coals: *And* the term "round coals" shall be considered as meaning all coals which shall pass over a screen, the bars of which are not more than three-eighths of an inch asunder: *And* the term "small coals" as meaning all coals which shall pass through the like screen.

Part of sale monies. *Rendering*, &c. a rent or sum of money equal to one-twelfth part or share of the gross amount of all the monies arising from the sale of such coals in every year, And if the said mines shall in any year fail in producing tons of coal, then such an additional rent or sum as together with the last-mentioned rent or sum shall amount to the sum of £ sterling for every such year.

rates, assessments or impositions, or for any other cause or thing whatsoever, except the income tax payable by landlords, and the land tax: AND the said (*lessees*), for themselves jointly and severally, and for their several heirs, executors, administrators and assigns, do and each of them doth by these presents covenant and agree with the lessor in manner following, that is to say, That they the lessees or lessee shall and will well and truly pay, or cause to be paid, to the lessor for the time being the aforesaid several rents and sums of money hereby respectively reserved and made payable at the times and in the manner hereinbefore respectively mentioned: *And also* shall and will, at all times during the said term, well and truly pay, or cause to be paid, all taxes, rates, charges, assessments, tithes or commutation rent in respect thereof, or impositions whatsoever now or hereafter to be taxed, charged, assessed or imposed upon or in respect of the premises hereby granted and demised, except the income tax payable by landlords, and the land tax: *And also* shall and will, at the expiration of one calendar month after the end of every year of the said term of forty-two years, well and truly pay, or cause to be paid, to the lessor for the time being, for the use of himself or themselves, or his or their tenant or tenants, full and reasonable satisfaction for the injuries or spoil which, during each such preceding year, shall have been committed to or upon the said lands hereinbefore described, or upon any crops, buildings or any other property thereon or therein, by the prosecution of the mines hereby demised, or by the enjoyment of any of the liberties or privileges hereby granted: *And also* that it shall be lawful for the lessor, from time to time, to distrain the coals, fire and other engines, waggons, wains, machinery and other the goods, articles and things of the lessees or lessee in, under or upon any part of the said lands, for or in respect of any rents or sums hereby reserved, in like manner as landlords may distrain for arrear of rents: *And also* shall and will, at all times during the said term, keep or cause to be kept at the counting-house or office, to be situate in some part of the said lands, correct and intelligible books of account, upon some approved and usual plan and principle, in which books entries shall be made of the quantity and description of all coals [and coke] to be so raised, produced and brought to bank, as well from the mines and premises hereby demised as from any adjoining mines of the lessees or lessee, by means of outstroke or instroke as aforesaid, and distinguishing between the produce of the mines and premises hereby demised and the produce of such other adjoining mines: *And also* shall and will, on each and every of the days hereinbefore mentioned for the payment of the contingent rents and sums of money hereby respectively reserved, make out and deliver, or cause to be made out and

Covenants by lessees.

To pay rent,

taxes and rates,

for damages.

Power to distrain.

Account books and plans.

delivered, to the lessor or his agents, a proper and correct abstract or copy of the said books of account for the then last preceding year: *And also* shall and will, from time to time, during the said term, cause to be made true, correct and intelligible plans and sections, as well of the said mines hereby demised as of any such adjoining mines to be so worked as aforesaid, and of the progress and actual state of the works in the said mines respectively: *And also* that all coal waggons or other carriages, tubs or boxes used by the lessees or lessee within the district shall be of the same known size and capacity, and shall not be altered unless two calendar months' notice in writing of such intended alteration shall be given to the lessor or his agent, and that such alteration shall be made only at the beginning of a year of the said term: *And also* that the lessor or his agent may at any time during the said term measure all or any of the waggons, carriages, tubs and boxes; and if upon any such measuring the said waggons, carriages, tubs or boxes, or any of them, shall be found to contain more than the acknowledged and specified quantity, then the lessor or his agent may stop such of them as carry over-measure, until the lessees or lessee shall reduce the same to the uniform and proper size and capacity: *And* all such waggons, carriages, tubs or boxes so carrying such over-measure shall be considered to have carried the same for three calendar months next preceding such measuring as aforesaid, and be accounted for accordingly, unless any such measuring shall have been made within the space of three calendar months, and then only from the time of such last previous measuring: *And also* shall and will permit the lessor and his agents to enter into and upon, and have free access to any counting-houses or offices for the purpose of examining the said several books of account, plans and sections, and the sections of strata and other records relating to the searching for or winning any coal or other mines in the said lands and in any adjoining lands, and to take copies thereof and to make extracts therefrom respectively: *And also* shall and will, if required by notice in writing from the lessor or his agent, in a proper and workmanlike manner proceed to sink or dig, within one calendar month after the receipt of such notice, one or more pit or pits, in the said lands down towards the bed of coal called the two feet coal, and shall afterwards continue such work or works regularly and properly till the said last-mentioned coal shall be effectually obtained and won: *And also* shall and will, at all times during the said term, work and carry on, as well the said mines hereby demised as such adjoining mines to be worked as aforesaid, properly and according to the most approved practice from time to time adopted in the winning and working of coal mines in the same district, and without any

Waggons of equal size.

Examination of accounts and plans.

To win a certain seam.

To work the mines properly.

unnecessary waste of the coal hereby demised, and with as little damage as possible to the surface of the said lands hereinbefore described, or to the messuages, buildings, walls, fences and other property thereon: *And also* shall not nor will injure or endanger the houses, walls and other erections now or hereafter being on any part of the same lands by undermining the foundations thereof, or working the said mines hereby demised, or such adjoining mines as aforesaid, in a negligent or improper manner: *And also* shall not nor will make or sink any pit, or make railways or other ways, or otherwise disturb or interfere with the surface of the said lands hereinbefore described, within the space of 150 yards from the farm-houses or any other buildings thereon, without the previous and express consent in writing for any such purpose from the lessor: *And also* shall and will leave unworked underneath or near to such farm-houses and other buildings as aforesaid so much of the strata, coal and other minerals there situate as the lessor for the time being or his agent shall direct: *And also* shall and will, in working the mines hereby demised, keep and leave unworked in every seam of coal, and in every vein or bed of other mineral, a barrier of whole coal or other mineral of at least twenty yards in breadth or thickness in every part next to or adjoining any coal or other mines or seams whatsoever which are not the property of the said lessor; and also shall not nor will break or otherwise diminish any such barriers without the previous consent in writing of the lessor, except by way of such outstroke or instroke as aforesaid: *And also* shall not nor will cause to be made in the whole more than three such drifts or passages, by way of outstroke and instroke, in pursuance of the powers aforesaid; and that all such drifts and passages shall not exceed six feet in width: *And also* shall and will, upon the expiration or sooner determination of the said term, provide sufficient frame dams for all such drifts and passages, so that the same may be effectually stopped and secured, except in all such places as the said barrier shall have been removed with such consent in writing as aforesaid: *And also* shall not nor will leave underground a greater quantity of the coals actually worked than eight parts per centum of the whole: *And also* shall not nor will, at any time during the said term, permit any coals, minerals, materials, goods or merchandize, other than are so allowed under the rights and powers hereby demised as aforesaid, to be carried, passed over or across, or along any railways or other ways or roads to be used by the lessees or lessee by virtue of these pits, without an agreement in writing between them or him and the lessor first had and obtained for any such purpose: *And also* shall and will cause to be properly laid aside in heaps all the earth and refuse which shall be dug up in

Not to injure buildings.

Not to work near farm-houses.

Barrier.

Not to leave worked coal,

Nor permit use of railways by others.

To heap the refuse.

working of the said mines hereby demised, or such adjoining mines: *And also* shall and will secure and keep open with timber, or by other good, effectual and durable means, all pits and shafts now sunk or made, or hereafter to be sunk or made, in the said lands hereinbefore described, and make and maintain sufficient walls or fences round every such pit and shaft: *And also* shall and will, at all times during the said term, keep the said mines hereby demised well and sufficiently drained from water and supplied with fresh air: *And also* shall and will well and sufficiently support and secure the said mines and the waygates, watergates and passages thereof with sufficient pillars of coal or strong timber, or brick or stone arching, or by other good, effectual and durable means: *And also* shall not nor will, at any time during the said term, commit, neglect or omit any act, deed, matter or thing whatsoever whereby the said mines or works shall or may be in anywise endangered, injured or damaged: *And also* shall and will, when and so often as any pit or shaft, now or hereafter to be sunk or made in the said lands, shall during the said term become useless or unnecessary in consequence of any mine or seam becoming exhausted, or from the making of some other pit or shaft in another place, or from any other cause, when thereunto required by the lessor or his agent, but in no case without his or their consent in writing, cause to be filled up and levelled such pit or shaft: *And also* shall and will, at the request of the lessor or his agent in writing, at the end or sooner determination of the said term cause to be restored to their original or natural condition all such parts of the said lands as shall have been so appropriated for any of the purposes of these presents as aforesaid, and which shall not be used or occupied by the lessees or lessee, or shall, at the option of the lessees or lessee, well and truly pay to the lessor the full amount in money of the value of the fee simple of the parts so appropriated, and so ceased to be used or occupied as aforesaid, such land still remaining the property of the lessor: *And also* shall and will, at all times during the said term, well and effectually fence off all such parts of the said lands as shall be so appropriated and used or occupied for the time being as aforesaid, with good substantial posts and rails, and convenient and sufficient gates, and maintain all such fences in good and sufficient repair: *And also* shall and will, at all reasonable times during the said term, permit the lessor and his agents, workmen and servants, to go down any pits or shafts, now or hereafter to be sunk or made in the said lands or in any such adjoining mines as aforesaid, and to enter into and examine as well the mines and works hereby demised as such adjoining mines, and to make surveys and plans thereof respectively, without any denial, interruption or hindrance whatsoever; and for such purposes shall and will

To secure pits.

Water and air.

Injuries.

Pits unnecessary.

To restore spoiled land.

To fence the land used.

Permit lessor to enter.

permit the lessor and his agents, workmen and servants, to use all the machinery, works and means employed in the said mines respectively from time to time, and with proper workmen and servants effectually assist such person or persons as aforesaid in going down any such pits and shafts, and in entering into and examining the said mines and works respectively in manner aforesaid, and in returning to the surface: *And also* shall not nor will assign, demise or otherwise dispose of the said mines and premises hereby granted and demised, or any part thereof, for the said term or any part thereof, without the previous consent in writing of the lessor for the time being: *And also* shall and will, upon breach of any of the covenants, provisoes and agreements herein contained, if required thereto by the lessor, well and truly convey and surrender to him by deed or writing the said mines and premises hereby demised for the remainder of the said term hereby granted thereof as aforesaid: *And also* shall and will, at the end or sooner determination of the said term, yield and deliver up to the lessor, in good order, repair and condition, and fit for the future working or enjoyment thereof, the said mines and premises hereby demised, and all buildings, erections, pits, shafts, watercourses, levels, ways, roads, waygates and watergates, [furnaces and ovens,] for the time being used and employed in or about the working of the said mines, [and the manufacture of the said coke,] and the disposal of the coals [and coke] to be so produced thereout, and all and singular the moveable machinery, works, articles and things which the lessor shall then elect to purchase, at a price to be determined, in case of disagreement, by arbitration in the manner hereinafter mentioned, but so that the same be valued as the stock of a current going colliery: PROVIDED ALWAYS, and it is hereby further agreed, that the lessor shall not be at liberty to avail himself of his election either to purchase all or any of the machinery, works, articles and things hereinbefore mentioned, unless he or his agent shall give notice in writing to the lessees or lessee, at least six calendar months previous to the end or sooner determination of the said term hereby granted, of his electing to purchase the same, specifying in such notice the several machinery, works, articles and things intended to be so purchased, and shall not be at liberty to purchase any part or parts, but the whole of any individual machine, article or thing: *And* if the lessor shall not, by giving such notice as aforesaid, avail himself of his election to purchase all or any of such machinery, works and things, then the lessees or lessee shall be at liberty at any time before the expiration of six calendar months after the determination of the said term to sell, either by public auction or private contract, on the said lands, the machinery, works, articles and things which shall be legally removable by them or

Not to assign.

Yield up possession.

Election to purchase materials.

Removal.

him, and shall not be elected to be purchased as aforesaid, and within the last-mentioned period to take and carry away the same from the said lands, on their or his repairing or making good the damage or injury which may be done to the said lands by the removal of such machinery, works, articles and things: *Provided always*, that the lessees or lessee shall not be at liberty to remove the timber and materials necessary for keeping open any parts of the said mines, and proper for the future working thereof, nor any of the gates, posts or fences connected with any waggon-ways, or other roads or ways, to be used by virtue of these presents, but all such articles and things shall become the property of the lessor, without any compensation being made for the same: *And also*, within the same period, to take and carry away all coals and other produce of the said mines hereby demised, and any such adjoining mines worked as aforesaid: *Provided always*, that all such produce shall not exceed the usual amount of two months' sale, and shall be so heaped or placed together and so removed as to occasion no interruption or inconvenience to any persons carrying on the said mines hereby demised: PROVIDED ALSO, and it is hereby agreed, that in case the lessees or lessee shall be desirous at the end of any year of the said term of forty-two years to abandon and yield up all the said mines and premises hereby demised, and of such their or his desire shall give notice in writing to the lessor, or leave such notice at his usual or last known place of abode in England, six calendar months or more before the period of such proposed abandonment, Then this present indenture, and the term and estate hereby granted or demised, and every clause, matter and thing herein contained, shall at such last-mentioned period cease, determine and become absolutely void to all intents and purposes whatsoever, except in respect of any previous breach or nonperformance of all or any of the covenants and agreements hereinbefore contained on the part of the lessees or lessee, and except in respect of the covenants and agreements herein mentioned to be done and performed by them or him after the expiration or sooner determination of the said term: PROVIDED ALSO, and it is hereby expressly agreed and declared, that if at any time during the continuance of the demise, the several yearly or other rents or sums of money hereby reserved and made payable, or any of them, or any part thereof, shall be in arrear or unpaid for the space of three calendar months after any of the days or times hereby appointed for payment thereof respectively, or in case the lessees or lessee shall assign, demise or otherwise dispose of the said mines and premises, or any part thereof, contrary to the covenant in that behalf hereinbefore contained, it shall be lawful for the lessor, or his agent, to enter forthwith into

Power to abandon the mines.

Proviso for re entry.

and upon the mines and premises hereby demised, and the same to repossess and enjoy as fully and effectually as if these presents had not been made and executed: *And* thereupon the said term hereby granted shall cease and determine, without prejudice to the rights and remedies of the lessor against the lessees or lessee in respect of any of the covenants, provisoes or agreements herein contained, which may then be broken or unperformed, or which are to be performed or observed at or after the expiration or sooner determination of the said term; and on such determination by re-entry, a proportionate part of the said certain rent and the whole of the tentale rents shall immediately accrue and be recoverable in respect of that part of the current half-year or year which may have elapsed and of the coals worked and carried away during the same period [*Covenants for quite enjoyment, and for further assurance, as in the last Precedent*]: AND ALSO that the lessor or his heirs shall and will at any time within three months after the expiration by effluxion of time of the said term hereby granted as aforesaid, at the request, costs and charges of the lessees or lessee, by indorsement on these presents and the counterpart thereof, or by some separate deed or writing as they or he shall think fit, but whereof there shall be a counterpart executed by them or him, appoint and grant all and singular the mines and premises hereby demised unto the lessees or lessee, for and during the full further term of forty-two years, to commence and be computed from the day of the expiration by effluxion of time of the said term hereby granted as aforesaid and thenceforth next ensuing, at, under and subject to such and the like rents, reservations, provisoes and agreements as are hereby reserved, expressed and contained [*Arbitration clause, as in the last Precedent*]. IN WITNESS, &c. Further term.

No. 8.—*Licence to work a Limestone Quarry.*

THIS INDENTURE, made the 7th day of August, 18 , between (*lessor*) of the one part, and (*grantee*) of the other part, witnesseth, that, in consideration of the yearly rent, covenants and agreements hereinafter reserved and contained on the part of the said (*lessee*), his executors, administrators and assigns to be paid and observed, he the said (*lessor*) doth by these presents grant and demise unto the said (*lessee*), his executors, administrators and assigns, full, free, irrevocable and sole and exclusive licence and authority to win and work all those quarries or strata of limestone, situate, &c., without any interruption, claim or disturbance from or by the said (*lessor*), his heirs or assigns, or any other persons Granting part.

whomsoever, and to carry away and dispose of the produce thereof to and for his and their own use and benefit, and for
Liberties. the purposes aforesaid to make and use any drains or water-courses for clearing the said quarries from any water which may flow or accumulate therein; and to erect all such sheds, buildings, steam and other engines, machinery and conveniences upon or near the said quarries, as shall be proper and necessary for effectually carrying on the said works, or for the workmen employed therein; and also to use, repair or construct any railways, carriage or other ways or roads whatsoever to or from the said quarries, EXCEPT out of the licence
Exception. hereby granted, all such stone as shall be situate under any dwelling-house, garden, orchard, corn-mill or manufactory:
Habendum. TO HAVE AND TO HOLD the said licence and authority, and all and singular other the premises hereby granted and demised, with their appurtenances, unto the said (*grantee*), his executors, administrators and assigns, from the day of the date of these presents, for and during the full term of twenty-one years henceforth next ensuing: RENDERING AND PAYING therefore yearly, and every year during the said term, unto the said (*lessor*), his heirs and assigns, the rent or sum of fifty pounds of lawful money of Great Britain, by equal half-yearly payments, on the 2nd day of February and the 1st day of August in every year, the first payment thereof to be made on the 2nd day of February now next ensuing, free and clear from all taxes, rates, assessments, impositions and deductions whatsoever.

[*Insert the usual covenants for payment of the rent, rates, and taxes, for the proper working of the quarries, and for the payment of damages, the usual proviso for re-entry, and covenants by the lessor. See the last two Precedents.*]

Exclusive licence. N.B.—The above form is adapted to the case of an *exclusive* licence. If it is intended to give to others, or to retain similar powers of working the quarries, the form may easily be adapted accordingly, and any special provisions with respect to the joint enjoyment of roads or works may be framed in language similar to that used in the last precedent. The proviso for re-entry should be made to operate by way of notice, as in No. 11.

No. 9.—*Power in a Settlement to grant Rights of Way.*

PROVIDED ALSO, and it is hereby further agreed and declared, that it shall be lawful for the said A. B., and after his decease for any person who shall by virtue of any of the limitations hereinbefore contained be in the actual possession

of, or entitled to the rents and profits of any of the hereditaments hereby granted and assured for his or her life, and also for the said (*trustees*) and the survivor of them, and the executors or administrators of such survivor during the minority of any person who shall, by virtue of any of the limitations aforesaid, be in the actual possession of or entitled to the rents and profits of any of the same hereditaments for an estate of freehold and inheritance, by any deed or deeds, to appoint, demise or lease any parts of the same hereditaments to be converted into and used as a railway or other way, or to be held and enjoyed for the purposes of any such ways, unto any person or persons for any term of years, not exceeding sixty years, to take effect in possession, and not in reversion, or by way of future interest: *Together* with full liberty and authority to make and construct all such railways and other ways upon any approved or improved plan and principles, and to use and enjoy the same for any purpose whatsoever, and in any manner whatsoever, so that in all such leases there be reserved and made payable the best and most improved yearly rents that can be reasonably obtained for the same, without taking any premium or foregift for the making thereof, and there be contained a power of re-entry for the nonpayment of the rents thereby respectively reserved, and so that the respective lessees duly execute counterparts of such leases, and enter into proper covenants and agreements for the due payment of such rents, and be not thereby made dispunishable for waste further than may be required for the purposes aforesaid.

No. 10.—*Lease of Ground for a Railway, by a Mortgagee and a Mortgagor.*

THIS INDENTURE, made, &c., between (*mortgagee*) of the first part, (*mortgagor*) of the second part, and (*lessee*) of the third part: WHEREAS, by an indenture, dated, &c., the pieces or parcels of ground hereinafter described, and intended to be hereby demised, were (together with several other hereditaments) conveyed and assured to the use of the said (*mortgagee*), his heirs and assigns, subject to a proviso for redemption on payment to the said (*mortgagee*), his executors, administrators or assigns, of the sum of £5,000, and interest, upon the 12th day of November next ensuing: AND WHEREAS the said pieces or parcels of ground are intended to form and be used as a railway for the several purposes hereinafter mentioned; and the said (*mortgagee*) and (*mortgagor*) have accordingly agreed to demise the same to the said (*lessee*), in the manner hereinafter expressed: NOW THIS INDENTURE WITNESSETH, that in pursuance

Recital of mortgage.

Witnessing part.

of the said agreement, and in consideration of the rent, covenants and agreements on the part of the said (*lessee*), his executors, administrators and assigns, to be paid and performed, He the said (*mortgagee*), at the request, and by the direction of the said (*mortgagor*), testified by his executing these presents, DOTH hereby grant and demise, and he the said (*mortgagor*) DOTH hereby grant, demise and confirm unto the said (*lessee*), his executors, administrators and assigns, ALL those pieces or parcels of land, as the same are now staked and set out, and extending in one continued line from, &c. to &c. [*Describe the parcels*], *Together* with their and every of their appurtenances: *And also, together* with full and complete licence and authority, in, under, upon or along all the said pieces or parcels of land, hereby or intended to be hereby demised, to lay down and construct, upon the most approved plan and principles, and upon a proper level, a regular and continued iron railway, either with a single or a double line, for the purpose of conveying coal and other minerals, or any other materials whatsoever, or any passengers, or for any other purposes whatsoever, for all or any part of such way, and to unite the said railway with any other railway, or other ways or roads whatsoever; and to erect and make any gates, houses, sheds, buildings, walls, fences, bridges, mounds, drains, watercourses, works, and other conveniences which may be requisite or proper for the effectual formation, repair and management of the said railway, and for depositing or keeping any coals or other materials which may be intended to pass, or which may have already passed along the said way or any part thereof; and also to use or employ thereon all such servants, workmen, horses, rollers, waggons and other carriages, steam or other engines, either fixed or locomotive, and all other articles, means and things which may be required for the purposes of this demise: *And also* with full and free liberty, at all times during the continuance of the said term hereby granted, to authorize in writing any other person or persons whomsoever, and upon any terms and conditions whatsoever, not inconsistent with the terms of this demise, to use and employ the said intended railway as fully and effectually as the said (*lessee*), his executors, administrators and assigns might use and employ the same by virtue of these presents, *And all*, &c.: TO HAVE AND TO HOLD the said pieces or parcels of ground, way, and all and singular other the premises hereby or intended to be hereby demised unto the said (*lessee*), his executors, administrators and assigns from the first day of May next, for the full term of twenty-one years thence ensuing: RENDERING AND PAYING therefore, yearly, and every year during the said term, unto the said (*mortgagee*), his heirs and assigns, the yearly rent or sum of £200

Parcels.

Power to form railway.

And to authorize others to use it.

Habendum.

Reddendum.

of lawful money of Great Britain, by equal half-yearly payments on the 1st day of May and the 11th day of November in every year, free from all rates, taxes, assessments and deductions whatsoever, the first payment thereof to be made on the 11th day of November now next ensuing: AND the said (*lessee*) doth hereby for himself, his heirs, executors, administrators and assigns covenant, promise and agree with and to the said (*mortgagee*), his heirs and assigns, in manner following, that is to say, that he the said (*lessee*), his executors, administrators or assigns, shall, at all times during the said term, well and truly pay or cause to be paid unto the said (*mortgagee*), his heirs and assigns, the said yearly rent or sum of £200, hereinbefore reserved, at the times and in manner aforesaid, without any deduction or abatement whatsoever: *And also* shall and will immediately, and with all reasonable diligence, in, under, upon or along the said pieces or parcels of ground hereby demised, lay down and construct, upon the most approved plan and principles, upon a proper level, and in a workmanlike manner, a regular and continued iron railway, according to the true intent and meaning of these presents: *And also* shall and will, during the said term, well and effectually drain and keep dry the said railway and works, by sufficient drains and watercourses, and level down and sow with sufficient grass or clover seeds the sides adjoining the said railway, along the whole extent thereof, in such places as may be capable of producing grass: *And also* shall and will, with all convenient speed, plant along each side of the said railway, and so as to form the outer fence or boundary of such sides, a quickset thorn hedge or hedges, and in the meantime shall and will effectually fence off the said railway and works from the lands and property adjoining thereto: *And also* shall not nor will, at any time during the said term, permit any other persons, except his or their own workmen or servants, to use and employ any part of the said railway and works, without leave, in writing, first obtained from the said (*lessee*), his executors, administrators or assign: *And also* shall and will, at all times, permit and suffer the said (*mortgagee*), his heirs or assigns, and his and their agents, to enter upon any part of the said demised premises at all reasonable times, in order to examine the condition thereof: *And also* shall and will, at all times during the said term, lay down all such new rails as shall be required from time to time, and keep and preserve in good order, repair and condition the said railway, erections, houses, fixed steam or other engines, sheds, buildings, walls, fences, gates, rails, heaps, drains, watercourses and other works thereto belonging; and at the end or sooner determination of the said term hereby granted shall leave the same in such good order, repair and condition for the use

Covenant by lessee,

to pay rent.

Construct railway.

Drain the works, &c.

Fences.

Leave to others in writing.

Power of entry to inspect.

New rails.

Repairs.

of the said (*mortgagee*), his heirs or assigns, such engines, rollers and rails to be taken by the said (*mortgagee*), his heirs or assigns, at a fair valuation, to be made thereof by competent persons, and, in case of disagreement, by arbitration, in the manner hereinafter mentioned: *Provided always*, that if the said (*mortgagee*), his heirs or assigns, shall refuse to take the said engines, rollers and rails, or to proceed to arbitration as aforesaid, or to pay the amount of any such valuation or award, it shall be lawful for the said (*lessee*), his executors, administrators or assigns, within three months from the determination of the said term, to remove and take away all such engines, rollers and rails for his and their own use and benefit: (*Proviso for re-entry as before*): PROVIDED ALWAYS, and it is hereby agreed and declared, that it shall be lawful for the said (*mortgagor*), his heirs and assigns, from time to time, to receive of and from the said (*lessee*), his executors, administrators or assigns, the said yearly rent or sum hereinbefore reserved, or so much thereof as shall for the time being be due and unpaid, until the said (*mortgagee*), his heirs or assigns, shall, by notice in writing, require the said (*lessee*), his executors, administrators or assigns, thenceforth to pay all such rent to him or them in the manner hereinbefore expressed: *And also* that, until such notice shall be given as aforesaid, it shall be lawful for the said (*mortgagor*), his heirs or assigns, when and as often as the said rent or any part thereof shall be in arrear and unpaid for the space of twenty-one days after the same shall be so due as aforesaid, without demanding payment thereof, to enter into and distrain upon the lands, ways and premises hereby demised for the said rent, or so much thereof as shall for the time being be due and unpaid; and the distress and distresses then and there to take, detain and dispose of, according to law in usual cases of distress for rent in arrear, until the said arrears of the said rent, and the costs and expenses attending any such distress or distresses shall be fully paid and satisfied: (*Covenants for title, &c., and arbitration clause as in No.* 6): IN WITNESS, &c.

Machinery, &c.

At the end of term.

Payment of rent to mortgagor till notice.

Power of distress.

No. 11.—*Lease or Grant of a Way-Leave, or Right of Way.*

THIS INDENTURE, made, &c., between (*grantor*) of the one part, and (*grantee*) of the other part, Witnesseth that, in consideration of the rent, covenants and agreements hereinafter mentioned on the part of the said (*grantee*), his executors, administrators and assigns, to be paid and performed: He the said (*grantor*) DOTH by these presents grant and demise unto the said (*grantee*), his executors, administrators

Grant.

and assigns, full, free and irrevocable licence, right and authority for himself and themselves, his and their agents, workmen and servants, to use and employ for the purposes hereinafter mentioned at all times between the hours of five in the morning and eight in the evening, ALL that railway extending, in one continued line, from A., in the parish of B., to B., in the parish of A. [*Describe the way*], *Together* with full and free liberty for him and them, within the hours aforesaid, to pass and repass along the said line hereinbefore described, and with all usual waggons and other carriages, either drawn by horses or drawn or propelled by steam or other engines, or by any other power or contrivance, to convey all such coal and other minerals as shall, from time to time, be raised by the said (*grantee*), his executors, administrators or assigns, from and out of all that mine [*Describe the mine, or pit or seams*], and to convey all other materials, articles and things, which shall be thought necessary or proper for carrying on the said mine; and for the purposes aforesaid to use and employ all the fixed engines, rollers, ropes, machinery, buildings and works belonging to the said railway, *Together* with all and singular other privileges, advantages and appurtenances to the said right of way belonging or appertaining: TO HAVE AND TO HOLD the said licence, right and authority, and all and singular other the premises hereby demised unto the said (*grantee*), his executors, administrators and assigns, from, &c., for the full term of twenty-one years thence next ensuing: RENDERING AND PAYING therefore, &c., (*Reddendum and covenant for payment of rent as in the last Precedent*): *And also* shall and will, at all times during the said term hereby granted, permit and suffer the said (*grantor*), his heirs or assigns, and all other persons duly authorized by him or them or his late father, also to use and enjoy the said railway for any similar purposes peaceably and quietly, and with as little disturbance and interruption as possible: *And* shall and will accordingly enter into and adopt all reasonable arrangements which shall from time to time be proposed by the said (*grantor*), his heirs or assigns, or other persons aforesaid in that behalf: *And also* shall and will, at all times, do as little injury as possible to the said railway and the sides, rails, fences and drains thereof, and the buildings, works and other property belonging or enjoyed in connection therewith: *And* shall also, from time to time during the said term, except during the last year thereof, contribute his and their just proportion of all such reasonable costs and expenses as shall be required to be incurred for the laying of new rails or the necessary repair, support and order of the said railway hereby authorized to be used and employed as aforesaid, and of all the sides, rails, fences, drains and walls belonging thereto, and

Parcels.

Powers.

Habendum.

Reddendum.

Covenant to allow grantor to use way.

Mutual arrangements.

Injury.

Costs of repair.

of so much of the engines, rollers, ropes, buildings, machinery and works held therewith as shall be used and enjoyed by the said (*grantee*), his executors, administrators or assigns, in common with any other persons whomsoever: PROVIDED ALWAYS, and it is hereby agreed and declared, that in case and so often as, during the said term, the said yearly rent or sum hereby reserved or any part thereof, shall remain unpaid for the space of twenty-one days next after any of the said days hereby appointed for the payment thereof, then it shall be lawful for the said (*grantor*), his heirs or assigns, to distrain upon any part of the said railway hereinbefore described for the same rent and all arrears thereof, and the property of the said (*grantee*), his executors, administrators or assigns, there found to take and carry away, as landlords are authorized to do for rent in arrear, until the said yearly rent, or so much thereof as shall be due, and all costs and expenses occasioned by the non-payment thereof, shall be fully satisfied and paid: PROVIDED ALWAYS, and it is hereby further agreed and declared, that in case, at any time during the said term, the said (*grantee*), his executors, administrators or assigns, shall neglect or refuse to perform any of the covenants and agreements hereinbefore contained, and on his and their part to be respectively observed, then it shall be lawful, upon any such breach as aforesaid, for the said (*grantor*), his heirs and assigns, by notice in writing, and signed by him or them, and delivered to the said (*grantee*), his executors, administrators or assigns, or left at his or their usual or last place of abode, to declare that these presents and the right and liberty hereby granted shall thenceforth determine, and thereupon these presents and the said right and liberty shall forthwith become absolutely void to all intents and purposes whatsoever, except in respect of any prior breach of the covenants and agreements herein contained.

Power of distress.

And to determine grant on breach of covenant.

Covenants by grantor.

(*Covenants by the grantor for title, &c., in manner aforesaid, "according to the true intent and meaning of these presents," and "without any unnecessary interruption or disturbance from the said* (*grantor*), *his heirs, or assigns, or other persons whomsoever."*)

Good repair.

And also shall and will, at all times during the said term, keep and preserve the said railway, buildings, fixed engines, machinery, rollers, ropes and works, hereby authorized to be used and enjoyed in common as aforesaid, in good order, repair and condition, and in all respects fit for the purposes of the rights and liberties hereby granted and demised: *And also* shall and will, at all times during the said term, pay and discharge all taxes, rates and impositions whatsoever, to be charged or imposed in respect of the premises hereby demised as aforesaid. IN WITNESS, &c.

Rates and taxes.

(*If the grantor himself holds the way under a lease,*

there should be a covenant by him for payment of the rent and performance of the covenants mentioned in the original lease.)

No. 12.—*Exception of Ways in a Farming Lease.*

Except and reserved at all times, during the continuance of this demise, unto the said (*lessor*), his heirs and assigns, full and free liberty and authority to use and appropriate all such pieces or parcels of land as may at any time hereafter be required by the said (*lessor*), his heirs or assigns, or any other persons whomsoever, for the purpose of forming any railways or other ways for the conveyance of coal or any other minerals, articles or materials whatsoever, or of passengers, and in any manner whatsoever, or which may be reasonably required for the proper use and enjoyment of any such ways or for the purposes connected therewith, with full liberty and authority to convert such pieces or parcels of land for the purposes aforesaid, and to do all necessary and proper acts for making, repairing and maintaining in proper order and condition any such ways, and for effectually draining and fencing off the same from any of the adjoining lands comprised in this demise: *Provided always*, that the said (*lessor*), his heirs and assigns, or other persons aforesaid, shall make all proper and reasonable compensation to the said (*lessee*), his executors, administrators or assigns, for the injuries sustained by him or them in the formation and maintenance of any such ways or works aforesaid, and shall, at all times during the said term, effectually fence off the same from any of the adjoining lands hereby demised; and also that the said (*lessor*), his heirs or assigns, shall at all times make all proper abatements and allowances in the amount of the rent hereby reserved, in consequence of such ways and works.

Proviso for compensation,

and fencing.

(*The lessor should covenant in similar language for the payment of damages, the making and maintenance of proper fences, and the reduction of rent; in some cases it may be advisable to fix the allowance at a certain sum per acre.*)

No. 13.—*Lease of Works for the Smelting and Manufacture of Iron.*

This Indenture, made the 23rd day of January, 18 , between (*lessor*) of the one part, and (*lessees*) of the other part, Witnesseth that, in consideration of the rent, covenants and agreements hereinafter contained, and on the part of the said (*lessees*), their executors, administrators and assigns, to

be paid and performed, he, the said (*lessor*), DOTH by these presents grant and demise unto the said (*lessees*), their executors, administrators and assigns, ALL, &c. (*parcels*), *Together* with full and free liberty and authority for them the said (*lessees*), their executors, administrators and assigns, on any part of the said pieces or parcels of ground hereby demised, to erect and establish any works for the smelting and manufacture of iron in any of its branches or departments, and to erect and construct accordingly all such furnaces, coke ovens, steam and other engines, machinery, reservoirs, aqueducts, workmen's houses, offices, buildings and works, as may be proper and convenient for carrying on any such trade or employment: *And also* in and upon the said pieces or parcels of ground to lay down and deposit all the scoria and other refuse which shall be produced from the said intended iron works as aforesaid: *And also* with full and free liberty, from time to time, to alter and convert such intended works into any other works for any other manufacture or purpose, as often as the said (*lessees*), their executors, administrators and assigns, shall think proper, but so that such alteration and conversion be made at all times with the consent in writing of the said (*lessor*), his heirs or assigns, and so that any such other works shall not be for the making of alkali, or be prejudicial to the health of the inhabitants in the neighbourhood, or to the agricultural and other produce thereof: *And also* with full and free liberty to use and employ all such railways or other ways and roads which are now laid down and used upon any part of the lands hereby demised, or upon any part of the adjoining lands of the said (*lessor*) which lead to or from the said intended works, and all the buildings, machinery and works necessarily and actually connected therewith, for the conveyance of all the iron ore, iron stone, coals, coke, limestone, and all other minerals, articles and materials whatsoever which shall be required for the purposes aforesaid, and of all the iron, articles and things to be made or manufactured as aforesaid, but so as not to give any unnecessary disturbance or interruption to any persons entitled, from time to time, to use any such ways or roads aforesaid, for any purposes whatsoever: *And also* for any of the purposes aforesaid, with full and free liberty, if they or he shall think proper, to construct in the direction, and corresponding with the line marked blue on the said map or plan indorsed on these presents, a good and sufficient railway or other way or road, not exceeding fourteen yards in breadth: *And* upon any such railways, or other ways or roads aforesaid, to use and employ, from time to time, all such engines, waggons and other carriages as it is usual and proper to employ thereon respectively: *Provided always*, that the said (*lessees*), their executors, administrators or

Parcels.

Power to erect works,

and change them with consent into other works.

And use railways.

And construct a new railway.

Compensation.

assigns, shall, in the formation and appropriation of any such new ways or roads aforesaid, pay compensation to the said (*lessor*), his heirs or assigns, at the rate of £200 per acre: *And also* with full and free liberty for any of the purposes aforesaid, to take and employ any water that may be found or procured in any part of the said demised lands, or in any part of such adjoining lands of the said (*lessor*) as aforesaid; and to dig, sink and search for such water as may be in or under the same or any part thereof, and to conduct such water by pipes or any other means to any part of the said demised premises, the said (*lessees*), their executors, administrators and assigns, doing the least possible damage or injury to any such lands by any such operations, and immediately repairing all such damage or injury to the satisfaction of the said (*lessor*), his heirs or assigns: *And also* with full and free liberty to search for, dig, take and use, for any of the purposes aforesaid, any building stone, limestone, clay, gravel or sand which may be found upon any part of the said premises hereby demised: EXCEPT and reserved out of this present demise unto the said (*lessor*), his heirs and assigns, full and free liberty and authority at all times to use or to authorize any other persons whomsoever to use in manner aforesaid the railway or other way proposed to be so formed and constructed as aforesaid, and all machinery, buildings, articles and works necessarily connected with the enjoyment thereof for any purposes whatsoever, but so that no unnecessary hinderance or disturbance be occasioned to the said (*lessees*), their executors, administrators or assigns, or their workmen, agents or servants, and so that all persons who shall use and enjoy any such way or road shall pay to them the said (*lessees*), their executors, administrators and assigns, reasonable compensation for the use and enjoyment thereof, to be ascertained in case of dispute or difference in the manner hereinafter mentioned (*Habendum, Reddendum and Covenants for payment of rent as in Nos.* 5 *or* 6): *And also* shall and will, from time to time, pay an additional rent or sum after the rate of £200 per acre, in respect of any additional land or ground which may be appropriated by the said (*lessor*), his heirs or assigns, for any of the purposes aforesaid, in the manner hereinafter expressed: *And also* shall and will, at all times during the said term, well and truly pay all taxes, charges, rates, assessments and other impositions whatsoever, which now are or may be hereafter charged or imposed upon or in respect of the said demised premises, or any of the rights and liberties hereby granted as aforesaid: *And also* shall and will, within three months from the date of these presents, proceed to erect and establish the said works for the smelting and manufacture of iron, and with all reasonable diligence prosecute the same to a

Use water,

and stone, &c.

Exception of joint use of railway.

Habendum.

Covenants to pay additional rent.

Taxes and rates.

To erect iron works,

or other works.

state of completion so as to sell the produce thereof: *And also*, in case such works intended for the manufacture of iron shall at any time or times during the continuance of this demise be altered and changed into other works for the carrying on of some other trade or manufacture, with such consent as aforesaid, shall and will from time to time, and immediately upon such consent being had and obtained, proceed to make such alteration, and with all reasonable diligence prosecute and carry on the same till such other works shall be fully prepared for the purposes for which they may be designed: *And also* shall and will, at all times, well and effectually fence off with walls or by some other means all the said intended works, and with quick-set hedges, or other fences, the said railway or other way so proposed to be laid down and constructed as aforesaid, from all adjoining lands: *And also* shall and will, at all times, put up or erect proper gates which may be required on the line of any such proposed railway or other way, with sufficient locks and keys thereto; and also employ and keep proper gatekeepers, which may be required for the purposes of any joint occupation or enjoyment thereof; *And also* shall and will, at all times, pay and contribute their fair and proper proportion of all costs and expenses which may be incurred in maintaining and repairing any railways or other ways or roads, or any other machinery, buildings, articles or works which shall from time to time be used by the said lessees or lessee for the time being in common with any other persons as aforesaid: *And also* shall and will, at all times, commit as little injury as possible to any such railways, or other ways or roads, machinery, buildings, articles or works, and interrupt and interfere with, as little as possible, the enjoyment of any other persons entitled to use the same as aforesaid: *And also* shall and will, at all times during the said term hereby granted, well and truly keep and preserve in good, sufficient and tenantable repair and condition all the furnaces, reservoirs, aqueducts, houses, offices, buildings, works, railways or other ways, to be so erected or constructed as aforesaid, and in such good, sufficient and tenantable repair and condition, and fit for the further and effectual prosecution of such works, shall and will at the end, or other sooner determination of the said term, peaceably and quietly surrender and deliver up the same, and all and singular the premises hereby or to be hereby demised as aforesaid, unto the said (*lessor*), his heirs or assigns, for his and their own use and benefit (*Proviso for re-entry, and covenants for title, &c., as before*): *And also* shall and will, at any time or times during the said term, grant and demise, subject to the covenant, provisoes and agreements contained in these presents, unto the said (*lessees*),

Fences.

Gates.

Costs of ways.

Injury to ways, &c.

Good repair.

Proviso for re-entry, and covenants.

their executors, administrators or assigns, all such additional land or ground adjoining to the lands hereby demised, as they the said (*lessees*), their executors, administrators or assigns, shall require for the purposes of their said works or business (except for ways or roads) at the additional annual rent or sum of £200 per acre, and in proportion for a less quantity than an acre, to be payable in the manner hereinbefore mentioned with respect to the rent or sum so reserved as aforesaid: *And also* shall and will, at all times, pay and contribute, and cause all other persons so authorized as aforesaid to pay and contribute, their fair, respective and reasonable proportion of all costs and expenses which may be incurred in maintaining and repairing the said railway or other way or road so proposed to be constructed as aforesaid, and any machinery, buildings, articles or works necessarily and actually connected with the enjoyment thereof, if the same shall be so used by the said (*lessor*), his heirs or assigns, or other persons aforesaid, in the manner hereinbefore expressed: *And also* shall and will interrupt and interfere with, as little as possible, the enjoyment thereof by the said (*lessees*), their executors, administrators and assigns.

Additional land.

Proportion of costs.

(*A proviso enabling the lessor to elect to purchase the tools and moveable materials as in No. 6, may be inserted—and the arbitration clause.*) In Witness, &c.

No. 14.—*Deed of Partnership in Mines.*

This Indenture, made the 7th day of August, 18 , between (*trustees*) of the first part, and (*other partners*) of the second part: Whereas, by an indenture, bearing date the first day of August, 18 , and made between (*lessor*) of the one part, and the said (*trustees*) of the other part, the said (*lessor*) granted and demised all those mines [*Describe the parcels*], *To hold* the same, with their rights and appurtenances, unto the said (*trustees*), their executors, administrators and assigns, as tenants in common, for and during the full term of forty-two years, subject to the payment and performance of the yearly rents, covenants, provisoes and agreements therein respectively expressed and contained: And whereas the said parties to these presents have agreed to enter into a partnership for the working of the said mines comprised in the said indenture of lease, and for selling the produce thereof in the manner and upon the several terms and conditions hereinafter particularly expressed; and the said mines and premises were so granted and demised as aforesaid to the said (*trustees*) in trust for themselves and the said parties hereto of the second part, in the several and respective

Recital of lease.

Agreement for partnership.

shares and proportions hereinafter mentioned, and for the purposes of the said intended partnership: Now this Indenture witnesseth, that in pursuance of the said agreement, and in consideration of the premises, they the said (*trustees*) for themselves, severally and respectively, and for their several and respective heirs, executors and administrators, do and each of them doth hereby covenant, promise and agree with and to the said parties hereto of the second part, their executors, administrators and assigns, severally and respectively, and according to their respective shares and interest therein, that they the said (*trustees*), their executors, administrators and assigns, shall and will stand possessed of and interested in all and singular the mines and premises comprised in the said recited indenture of lease for the full term thereby granted, or for any renewed term thereof, subject as aforesaid, in trust for themselves and the said parties hereto of the second part, their respective executors, administrators and assigns, in the shares and proportions and in the manner hereinafter expressed: *And also* that they the said (*trustees*), their executors, administrators or assigns, shall and will, at all times during the said term, well and truly perform and discharge the several covenants, provisoes and agreements in the said indenture of lease on their parts respectively contained: And this Indenture also witnesseth, that in further pursuance of the said agreement, and in consideration of the premises, and of the mutual trust and confidence reposed in each other, they the said parties to these presents, for themselves, severally and respectively, and for their several and respective heirs, executors and administrators, but not jointly or for the other or others of them, do and each of them doth hereby mutually covenant, promise and agree with the others and other of them, their and his executors, administrators and assigns, in manner following, that is to say,—

First witnessing part.

Declaration of trust.

Covenants of lease.

Second witnessing part.

Mutual covenants.

Term of partnership,

That they the said parties to these presents, their executors, administrators or assigns, shall from the day of the date of these presents become, continue and remain co-partners and joint adventurers for the term of twenty-one years, determinable and renewable as hereinafter mentioned, for the purpose of effectually exploring and working the said mines and veins comprised in the said indenture of lease, for the washing, smelting and refining of all ores or minerals which may be produced from such mines or veins, and for the sale of all such produce, either in a natural or a manufactured condition.

and purposes.

[*If it is desirable to point out in a specific manner the particular objects to which the mining operations should be first directed, or their ultimate design or extent, or any particular mode of operations, or any other arrangements*

showing the scope and purposes of partnership, insert the necessary provisions in this place.]

That the business of the partnership shall be carried on and transacted under the firm of "The Gilderdale Mining Company." Firm.

That the shares and interest of the partners of and in the said mines and premises so demised as aforesaid, and of and in the effects and property to be held or connected therewith, and of and in all profits or losses which shall be received or sustained in the prosecution of the said mines and works, shall be distributed and held in manner following, that is to say, there shall be considered to be sixty-four shares therein, and the said (*one partner*) shall be entitled to eight of such shares, or one-eighth of the whole, the said (*another*) to four of such shares, or one sixteenth of the whole (*and so on according to the facts*). Shares.

That the shares and interests of the said partners of and in all such mines, works and premises may be sold, mortgaged or partially or absolutely disposed of to any co-partner or other persons whomsoever; and such persons shall, upon any such sale or disposition, become partners in the same manner as if they had been parties to these presents, and the partners disposing absolutely of their shares and interest shall immediately cease to be partners, and shall be freed from all future claims and liabilities: *Provided also*, that in the voluntary sale for valuable consideration of any such shares or interest, whether by public auction or private contract, all or any one or more of the co-partners shall have the right to take and purchase the same for such price or sum as shall be last bidden or offered for the same: *Provided also*, that any such purchaser, who shall not be one of the previous co-partners, shall be approved of by the said company before any such sale can be effected: *Provided also*, that such last-mentioned purchasers, and all other persons so entitled to become partners as aforesaid, shall enter into and execute all deeds and instruments which may be required by the said company for effectually binding their heirs, executors, administrators and assigns to the performance of the covenants and agreements herein contained, or so many of them as shall then be applicable, and shall previously, if required by the said company, sign and execute these presents, and such signature shall be in equity equally binding upon such purchasers and other persons, their executors, administrators and assigns, as if they had been originally parties hereto; and all such purchasers and persons who may have been previous partners shall be and remain as effectually subject to the performance of such covenants and agreements in respect of the shares or interest so acquired as aforesaid, as in respect of his original or other shares or interest. Transfer of shares.

Capital. That the capital of the said company shall consist of such sums of money as the partners shall from time to time think necessary for the purposes of the said adventure or works, and shall be contributed by them according to their respective shares and interests therein: *Provided always*, that the whole sum to be expended during the said term, for the purposes aforesaid, shall not exceed the sum of £10,000.

Sums unpaid. That if any partner, or any person who is entitled to become a partner as aforesaid, shall neglect or refuse at any time to pay and contribute his or her share of such last-mentioned sums or capital, it shall be lawful for the other partners either to place the amount of such deficiency to the debit of the account of the partner or other person so failing as aforesaid, and to carry legal interest, or, after six months' notice to any such partner or person, to take or absolutely to sell and dispose of all or any of his or her shares and interest in the said mines and premises, in the manner hereinafter provided in cases of the expulsion of a partner, and the produce thereof to be also applied accordingly; and any partner so failing shall immediately upon any absolute sale of his or her whole shares and interests, and such application as aforesaid, cease to be a partner, and shall effectually release the said company from all claims and demands whatsoever.

Agent, That the said A. B. shall be the acting partner, agent and manager of the said mines and works, on behalf of the said company, subject to be removed at any time, with or without cause, by the said company, and subject in all respects to their control, orders and directions, and shall receive, as a salary and remuneration for his services, such yearly sum as shall from time to time be agreed upon by the said company, to be payable every half-year.

his illness or absence. That the said company may from time to time appoint any other partner or person to be such acting agent or manager as aforesaid; and in the temporary absence or illness of any such agent or manager, any two of the partners may transact his business and perform his duties, subject to the terms, conditions and stipulations herein on that behalf contained.

Agent to employ clerks, &c. That, subject to such control and direction as aforesaid, the agent or manager shall appoint and employ all clerks, servants, stewards, under-agents, miners and workmen of the said company, and fix and pay the salaries and wages of all such last-mentioned persons, and receive all the funds and monies of the said company, and pay all rents, rates and taxes, and make all usual and necessary contracts and arrangements for carrying on the said mines and works, and transact and manage the whole business of the said company: *Provided always*, that the said agent or manager shall not give credit to any persons against the express caution or direction of the said company, and shall not commence or

prosecute any suit or proceeding at law or in equity against any persons whomsoever without their consent or concurrence, except in cases of extreme or urgent necessity.

That the said agent or manager shall not, without the consent of the said company, release or compound any debt or debts due and owing to the said company, except for the full amount thereof first paid, nor sign any certificate of any bankrupt indebted to the said firm, except in cases where the debt shall be under the sum of £20, nor buy, order or contract for any article, matter or thing on account of the said company exceeding the value of £50, except in cases of absolute necessity or in the ordinary course of business; and any such article, matter or thing so purchased by him without such consent as aforesaid shall be taken and paid for by the said agent or manager on his own separate account. Not to release debts or contract for above £50.

That the said agent or manager shall not on any account, without the express consent of the company, draw, make or accept, indorse or negotiate any bill of exchange, promissory note, check or draft, or any security in the name or on account of the said company, except for the purpose of selling the produce of the said mines and works, or of paying for machinery or materials to be used and employed in or upon the said mines or premises, or for payment of any salaries or wages due to any persons employed by the said company, and any such agent or manager so offending shall be liable to forfeit to the use of the said company double the amount of any sum mentioned or included in any such bills, notes, drafts or securities aforesaid. Nor negotiate bills, &c.

That proper and intelligible books of account shall be kept by the said agent or manager or under his immediate direction, and that true and correct entries shall be made therein of all sums of money received and paid, and of all the ore, minerals and other produce sold and delivered, and of all the materials, machinery, articles and things purchased on behalf of the said company, and the names, dates, places and any other circumstances which may be useful for both showing and ascertaining the state and proceedings of the said company. Books of account.

That the said books of account, together with all securities, bills, notes, letters, maps, plans or sections of the said mines, and other writings of the said company, shall remain and be kept at the office of the said company; and every partner shall, at all reasonable times, have free access to inspect, examine and copy the same.

That the said agent or manager shall, on behalf of the said company, well and punctually observe and perform all the covenants, provisoes and agreements on their part contained in the hereinbefore-recited indenture of lease, or to be contained in any lease of the same premises. Duties of agent.

That the said agent or manager shall regularly, diligently, faithfully and honestly discharge the duties and agreements on his part hereinbefore expressed.

Meetings of partners.

That the said company shall meet once in every quarter of a year upon such days and at such place as shall be mutually agreed upon, or at any other times when thereto specially required by any three of the partners.

Yearly settlements.

That on the same day, in the month of April, in every year, the partners shall meet, and, as far as possible, make a full settlement of all the debts, liabilities and engagements of the said company, and inspect and examine all the accounts, reckonings and transactions of the said agent and company, and such agent shall make and deliver at such yearly meeting an estimate and valuation of all the effects and property of the said company (except the mines for the time being unworked), and shall make proper distinctions in such accounts between good and bad debts; and the said partners shall, upon the approval and settlement of such yearly account, sign the same, and any duplicates thereof which may be required by any of the partners; and such accounts so signed as aforesaid shall be final, binding and conclusive to all intents and purposes, and shall not afterwards be opened or questioned by any persons whomsoever, except in respect of any manifest error, to the amount of £20, which may be discovered therein within the space of one year afterwards.

Refusal to attend.

That if any one or more of the partners shall neglect or refuse to attend such yearly meetings after due notice thereof, or to examine and inspect any such account and rest as aforesaid, then the other partners present shall proceed to make such account and settlement as aforesaid, and any partner refusing to sign such account and settlement shall not be entitled to receive any of the dividends or profits arising from such mines or works until such signature as aforesaid.

Voting.

That all difference and disputes arising during the said term shall be decided by a majority of votes, and the manner of voting on any such occasion shall be as follows, that is to say, every sixty-fourth share shall entitle the holder thereof to give one vote, and any share less than one sixty-fourth shall not entitle the holder thereof to give any vote at all unless he shall, together with the holder or holders of any such last-mentioned share, making together one sixty-fourth share or more, agree to give any vote in common: *Provided always*, that any partner may be competent to vote on behalf of any other partner who may be absent, and who may by any writing authorize such present partner to act on his behalf: *And provided also*, that the partners present by a majority of such votes shall not determine to settle any such difference or dispute by arbitration as hereinafter mentioned.

Indemnity.

That each of the partners shall keep indemnified the other

co-partners for the time being, and the effects and property of the said company from and against his or her own private debts and engagements, and all costs, charges, damages and expenses on account thereof.

That any partner lending money on account of the partnership shall be allowed legal interest for the same, and such money shall not be repaid without six months' notice in writing from the agent or manager. Partner advancing money.

That no partner, except the said agent or manager, shall, on any account whatsoever, give, accept, indorse or negotiate any bills, notes, drafts or securities, or take or dispose of the goods or effects of the said company, or engage the credit thereof in any manner whatsoever, or interfere in the actual management of the said mines and works, except in the manner hereinbefore mentioned. Bills and notes.

That if any of the partners, except as aforesaid, shall give, accept, indorse or negotiate any bills, notes, drafts or other securities on account of the said company; or if the monies, effects or property of the said company shall be seized, attached or taken in execution on account of any private or separate debts or engagements of any partner; or if any partner shall apply to his own separate use any of such monies, effects or property, then it shall be lawful for the other partners, by any writing, to determine and put an end to such co-partnership, so far as respects any such offending partner, and to expel him therefrom, and the shares and interest of such partner may be taken and purchased by the said company on the footing of the last yearly settlement; and if there shall have been no such settlement, then at a fair valuation, to be determined by arbitration as hereinafter mentioned, or such shares and interests may be absolutely disposed of by public auction or private contract to any of the partners, or any other persons wiling to purchase the same; and the produce of such sales or valuations shall be first applied in the liquidation and settlement of the account of the partner whose shares or interests are so sold or disposed of as aforesaid with the said company, and the surplus, if any, shall be paid to such partner upon his or her giving a sufficient receipt for the same, and a release of all claims and demands in respect of the said partnership; and such partner shall, upon any such sale or disposition of his or her whole interest in the said mines and premises, immediately cease to be a partner for any of the purposes of these presents. Partners offending.

That all bills, notes, drafts, receipts, accounts and securities shall be made and taken in the name of the said company; and all bonds, conveyances and assurances shall be made and executed in the names of the said (*trustees*), or any other persons, to be from time to time appointed by the said Trustees.

company for that purpose; and all such trustees, their heirs, executors or administrators, shall at any time when so required by the said company make, do and execute all such deeds, conveyances, assurances, matters and things which may be required by the said company, or their counsel, for effectually divesting themselves of all estate and interest therein, and for vesting the same in any other persons.

Power to dissolve.

That in case the said mines shall, after a competent trial thereof, prove to be unproductive, or shall become exhausted, or it may be advisable on any other grounds to discontinue the working thereof, then it shall be lawful for the partners, at any special meeting to be convened for that purpose, to declare the said partnership to be dissolved at any time previous to the expiration of the said term of twenty-one years.

Power to continue for a further term.

That in case the said mines shall continue productive or promising, it shall be lawful for the partners, within six months from the expiration of the said term, at any such special meeting as aforesaid, to prolong the said partnership for any further period not exceeding twenty-one years, to be conducted upon the same terms, conditions and agreements herein contained, and to procure a renewal of the said recited lease for any further period whatsoever.

Accounts on winding up.

That at the determination of the said partnership, an account in writing shall be forthwith made of all the effects, property, liabilities and engagements of the said company, and the said partners shall make adequate provision for the sale of all such property and effects, and the receipt, payment or fulfilment of all such liabilities and engagements, for the assignment of all outstanding debts for the benefit of the partners, and the settlement and winding up of the affairs of the said company; and the general residue and produce of such settlement shall be paid and divided amongst the partners for the time being, in the several shares and proportions to which they may be respectively entitled, and upon such division and final settlement, the said partners shall enter into and execute all such deeds and instruments in writing as may be required for their mutual release and indemnity. (*Arbitration clause, as in No.* 6.) In witness, &c.

No. 15.—*Conveyance of a Share in Mines by a Partner, who is also one of the original Lessees and Trustees.*

This Indenture, made the 7th day of August, 18 , Between (*vendor*) of the one part, and (*purchaser*) of the other part: Whereas by an indenture of lease bearing date, &c., and made, &c., all, &c. (*parcels as in the lease*) were

Recital of lease.

granted and demised, with the appurtenances, unto the said (*trustees*), their executors, administrators and assigns, as tenants in common, for the term of forty years, subject nevertheless to the payment and performance of the rents, covenants, provisoes and agreements therein respectively expressed and contained: AND WHEREAS by an indenture of copartnership bearing date, &c., the said mines, veins and premises comprised in the said recited indenture of demise, were declared to be held upon the trusts and in the respective shares and proportions therein expressed, and particularly as to four-sixty-fourth parts or shares, or one-sixteenth part or share thereof, in trust for him the said (*vendor*), his executors, administrators and assigns: *And* the said several parties thereto thereby mutually covenanted and agreed with each other for themselves and their respective executors, administrators and assigns, that they would thenceforth enter into a partnership for the term of twenty-one years, for the effectual working and prosecution of the said mines and veins, and the sale of the produce thereof; and that for the purposes aforesaid they would observe and perform all and singular the provisoes, declarations and agreements in the said indenture of copartnership respectively expressed and declared: AND WHEREAS the said (*purchaser*) hath lately agreed with the said (*vendor*) for the absolute purchase of the said parts or shares of him the said (*vendor*) at or for the price or sum of £500; and it has been further agreed that the said (*vendor*) should enter into the conveyance to the said (*purchaser*) in the manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreements, and in consideration of the sum of £500 of lawful money of Great Britain in hand well and truly paid by the said (*purchaser*) to the said (*vendor*) on or before the execution of these presents, the receipt of which said sum of £500, and that the same is the full consideration money for the absolute purchase of the said parts or shares hereby assigned, the said (*vendor*) doth hereby admit and from the same sum doth hereby absolutely acquit and for ever discharge the said (*purchaser*), his executors, administrators and assigns, and the said mines and premises; He the said (*vendor*) doth by these presents grant, assign and transfer unto the said (*purchaser*), his executors, administrators and assigns, all those or that four-sixty-fourth parts or shares, or one-sixteenth part or share of him the said (*vendor*) of and in all those mines, veins and premises hereinbefore described and comprised in the said recited indenture of lease, and of and in all the machinery, works, property, articles, chattels, rights, liberties, privileges, and appurtenances thereto belonging or enjoyed therewith: *And all* the estate, right, title, interest, use, trust, possession, property, claim and demand whatsoever, both at law and in

Deed of partnership.

Agreement to purchase.

Witnesseth.

Grant of share.

equity, of him the said (*vendor*) of, in and to the said parts
Habendum. or shares hereby assigned as aforesaid: To HAVE AND TO HOLD the said parts or shares, hereditaments and all and singular other the premises hereby assigned, with their rights and appurtenances, unto the said (*purchaser*), his executors, administrators and assigns, for and during all the residue of the said term of forty years so granted of the said mines and premises by the said recited indenture of demise as hereinbefore is mentioned, but *subject*, nevertheless, together with the other parts or shares to the payment and performance of the rents, covenants, provisoes and agreements on the part of the said lessees respectively reserved and contained in and by the same indenture of demise: *And also subject* to the observance and performance of the several covenants, provisoes, declarations and agreements respectively expressed and declared concerning the said parts or shares hereby assigned in
Further witnesseth. and by the said recited indenture of copartnership: AND THIS INDENTURE ALSO WITNESSETH, that in further pursuance of the said agreements and for the considerations afore-
Grant of legal estate in the whole. said, He the said (*vendor*) doth by these presents grant, assign and transfer unto the said (*purchaser*), his executors, administrators and assigns (so far as respects his estate and interest therein), all those other and remaining parts or shares not hereinbefore assigned of and in the said mines, veins and premises comprised in and conveyed by the said recited indenture of demise as hereinbefore is mentioned, together with their and every of their rights, privileges and appurtenances,
Habendum. *And all* the estate, &c., To HAVE AND TO HOLD the said parts or shares, hereditaments, and all and singular other the premises hereby lastly assigned, with their rights and appurtenances, unto the said (*purchaser*), his executors, administrators and assigns, for and during all the residue of the said term of forty years therein, but *subject*, nevertheless, together with the parts or shares hereby firstly assigned to the payment and performance of the rents, covenants, provisoes and agreements on the part of the said lessees respectively reserved and contained in and by the said indenture of demise, and UPON THE TRUSTS, and for the several ends, intents and purposes respectively expressed and declared thereof by the
Covenants. said recited indenture of copartnership [*Covenants by the vendor for title, quiet enjoyment and further assurance with respect to the "parts or shares hereby firstly assigned," and against incumbrances with respect to the "parts or shares*
Purchaser to observe terms of partnership. *hereby lastly assigned"*]: AND THIS INDENTURE LASTLY WITNESSETH, that in further pursuance of the said agreements, and in consideration of the premises, He the said (*purchaser*) doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with and to the said (*vendor*), his executors and administrators, that he the

said (*purchaser*), his executors, administrators and assigns, shall and will for and during the remainder of the said term of copartnership for twenty-one years, or any renewed term thereof, well and truly observe and perform all and singular the covenants, provisoes, declarations and agreements on the part of the said (*vendor*), his executors, administrators and assigns, expressed by the said recited indenture of copartnership to be observed and performed as aforesaid, or so much or so many of them as shall still be subsisting, as fully and effectually as if he the said (*purchaser*) had been a party to and executed the same indenture of copartnership: [*A covenant of indemnity against debts from a certain date may be added.*] IN WITNESS, &c.

[*This form may easily be adapted to the conveyance of an equitable share in mines. If there is no conveyance of a legal interest by the owner of the mines, and no partnership deed, there can, of course, be no reference to such previous transactions. The creation of any equitable interest, and the right of the vendor to particular shares, may be recited, and the conveyance be made to the intended purchaser, subject to the terms of the licence or agreement, with the usual covenants.*]

No. 16.—*Rules for a Cost-Book Company.*

1. The company is formed for working [*describe the mines*] in the county of , under the firm of , and shall be managed on the "cost-book principle.

2. The capital shall be £ , in shares of £ each, whereof £ per share shall be paid forthwith.

3. The general meetings of the shareholders shall be called by the manager once in every month: at which meetings all the affairs of the company shall be ordered or transacted, and all outstanding accounts and liabilities shall, as far as possible, be settled, and all differences shall be decided by a majority of votes—one share to be entitled to one vote, but no shareholder shall be entitled to more than votes; but votes may be given by proxy.

4. It shall be competent at such meetings to authorize calls and expenditure, to declare dividends, and to dissolve company.

5. The capital of the company shall not be increased, and no new mine or adventure shall be entered upon, without the consent of the whole of the shareholders.

6. The shares shall be transferable at the will of the holders, and such transfer shall be effected by entry in the cost-book, either by the signatures of the vendor and purchaser therein, or by the manager for the time being, duly

authorized by a certificate in the form hereto annexed, or to the like effect.

7. No such transfer shall be made without the full payment by the seller of all sums due in respect of the share or shares so sold at the last general meeting; and the purchaser shall be liable to all claims and demands, and be entitled to all profits arising in respect of his share or shares from the time of such last general meeting.

8. The manager shall at every general meeting produce a correct list of the existing shareholders, with the number of shares held by each person; and such list shall be approved of at every such meeting, and shall always be properly inscribed in the cost-book.

9. If any shareholder shall refuse or neglect for three calendar months to pay the call or calls due on his share or shares, such share or shares may, at any subsequent general meeting, be declared to be forfeited for the benefit of all the other shareholders, according to their respective interests therein; and such forfeiture shall comprise all share or shares in the materials and property of the company.

10. Any shareholder shall at any general meeting be at liberty to relinquish his share or shares, on giving notice in writing to the manager for that purpose, and on settlement of all claims arising with respect to such share or shares, and on giving up all his interest in all the materials and property of the company.

Form of Certificate.

To the Manager of the Mining Company.

I, the undersigned (*seller*), hereby certify that I have this day sold to the undersigned (*purchaser*) share of and in the mines held by the said company, and of and in all and singular the machinery, ores, minerals, materials, monies, debts and other effects and property now belonging to the said company, and the dividends and profits to arise therefrom: *And* I hereby authorize you to transfer such share accordingly: And I, the said (*purchaser*), hereby accept such share, *subject* to the rules of the said company. Dated this day of , 18 .

Witness, A. B.
C. D.

Part II.

LOCAL CUSTOMS.

Customs of the High Peak, Derbyshire, as described in the first Schedule to 14 *&* 15 *Vict. c.* 94.

1. It is lawful for all the subjects of this realm to search for, sink and dig mines or veins of lead ore upon, in or under all manner of lands of whose inheritance soever they may be (churches, churchyards, places for public worship, burial grounds, dwelling-houses, orchards, gardens, pleasure grounds and highways excepted); but if no vein of ore be found, and the person making search discontinues it for fourteen days, the land must be levelled and made good by the person making the search within the space of six days after the expiration of the said fourteen days, or the owner of such land may level and make good the same and recover the expenses thereof from the miner in an action of debt in the small barmote court or in the county court: provided always, that nothing herein contained shall prevent or hinder the miner from following and working his vein, and searching for and getting lead ore under such excepted places as aforesaid; but in case by so doing he shall damage or injure any such excepted places or the surface thereof, the owner or reputed owner and occupier may recover from such miner compensation for such damage or injury by action in the county court if the damage shall not exceed fifty pounds, or otherwise by action in the superior courts; but in case the owner or reputed owner or occupier of such excepted place as aforesaid apprehends that such working will endanger the security of such excepted places, the steward and grand jury shall have power to suspend the working of such vein, or to direct the working thereof so as to prevent such damage.

2. In all cases the land owner shall have power to sell and dispose of the calk, feagh, spar, and other minerals and rubbish (except lead ore), and to remove the same from his land so soon as the lead ore has been extracted from it, when and as often as he thinks proper and when not required for the use of the mine, but not so as to destroy or injure any mineral property without the consent of the barmaster and any two members of the grand jury.

3. The barmaster and every deputy barmaster shall provide a dish or measure, which shall contain fifteen pints of water, and be adjusted in the presence of two of the grand jury, for measuring the ore, and they shall forfeit the sum of two pounds every time they are required to measure ore of

any mine and are unprovided with such dish or measure, such penalty of two pounds to be recovered and received for his own use by the person who shall have required the ore to be measured, by an action in the county court.

4. The barmaster, together with two of the grand jury, shall provide the miners a way, either for foot passengers or carts as may be required, from the nearest highway to the mine, and also from the mine to the nearest running stream, spring, or natural pond of water, such ways to be set out in as short a course as may be practicable and reasonable. No compensation is to be claimed by the occupier or landowner for such ways, but such ways are not to be considered public, and the use thereof is to be limited to persons and purposes connected with the mine, and all rights of way are to cease when the mine shall be no longer worked. The parties entitled to use the way may make sufficient ways for use, and keep the same in repair, and may also use for mining purposes the water from the nearest running stream, spring or natural pond.

5. Every miner shall, so long as his mine shall be worked, be entitled, without making any payment for the same, to the exclusive use of so much surface land as shall be thought necessary by the barmaster and two of the grand jury and be set out by them, for the purpose of laying rubbish, dressing his ore, briddling, making meers or ponds, and conveying water thereto, and any other mining purposes. The miner shall in all cases, before he commences any search or uses any land, make fences sufficient for the protection of cattle from any injury which might arise from his operations, and keep such fences in sufficient repair.

6. Any person may transfer his interest in any mine or vein to any other person by causing an entry of such transfer to be made by the barmaster in the book to be kept by him as mentioned in the fourteenth section, and such transfer, when so entered, shall be valid and effectual.

7. When ore has been raised by any miner, and he shall desire such ore to be measured, the miner shall give the barmaster twenty-four hours' notice of the time he intends to measure; and if the barmaster neglect or refuse to attend, then the miner may employ any two persons, one of them being on the grand jury, who shall measure such ore, and lay the duties aside, for the use of the lessee for the time being of the duties of lot and cope, and if there shall be no such lessee, for the use of her Majesty and her successors.

8. No person shall sell any ore, or remove any ore from the mine, unless and until the same shall have been measured by the barmaster, or by such two persons as aforesaid in the event of the non-attendance of the barmaster, upon pain of forfeiting the full value thereof to the lessee of the

duties of lot and cope, or if there shall be no such lessee, then to her Majesty or her successors; and in case of non-payment of such value, after six clear days' notice requiring the same shall have been given by the barmaster to the miner, or affixed in or upon some part of the mine or the works thereof, the mine at which such ore was got shall be forfeited to the lessee of the said duties, and if there shall be no such lessee, then to her Majesty and her successors; and possession thereof may be recovered in manner hereinafter provided.

9. The duties heretofore called the duties of lot and cope are and shall be payable to her Majesty and her successors, or to her or their lessee for the time being. The duty called lot is and shall be one thirteenth part of all ore raised within the jurisdiction of the barmote courts as hereby declared and established, such thirteenth part to be set apart and taken by the barmaster when he measures any ore; and the duty called cope is and shall be the sum of fourpence for every load of ore measured at any mine within the jurisdiction aforesaid, the measure of such load being nine dishes of ore, whereof each dish shall be of capacity sufficient to hold fifteen pints of water. The said duties of lot and cope are and shall be payable in addition to the payments mentioned in any other article comprised in this schedule. And if any person shall neglect or refuse to pay the said duty of cope, the same may be recovered by the barmaster on behalf of her Majesty and her successors, or of her or their lessee for the time being, by action of debt in the small barmote court, or by action in the county court.

10. If any new vein be found by any miner or any other person whatsoever, the first finder shall be entitled to two meers in length of the said vein, one meer on each side of the founder to be measured and set out by the barmaster, in the presence of two of the grand jury, on the surface of the ground, within six days after notice given to him by the finder, and the third meer shall belong to the lessee for the time being of the duties of lot and cope, and if there shall be no such lessee then to her Majesty and her successors, to be set out in like manner at either extremity of the said two meers at the option of the barmaster; and the finder shall be entitled to each subsequent meer in such vein each way, to the extent he shall claim or require at the time of freeing the founder meers, and the barmaster shall enter the particulars of the gift in his book; and if the lessee for the time being of the duties of lot and cope, and if there shall be no such lessee, then if her Majesty or her successors, neglect or refuse duly and reasonably to work the meer so set out to such lessee or her Majesty or her successors as aforesaid, the finder shall have the right to purchase the said meer at such

price as the steward and grand jury may fix and determine, or the finder may continue and maintain his workings through the said meer, upon laying aside for the use of the lessee or her Majesty, as the case may be, all the ore that may be gotten therein, after deducting the expenses of getting the same.

11. The barmaster shall not set out any ground under the tenth article until ore shall have been raised from the mine for which such ground shall be required, nor until there shall have been paid to the lessee for the time being of the duties of lot and cope, or if there shall be no such lessee, to her Majesty and her successors, the first customary payment due to him, her or them, such first customary payment being so much ore as shall be sufficient to fill the dish or measure mentioned in the third article, and being called the freeing dish; and the miner shall pay to the lessee for the time being of the said duties, and if there be no such lessee, to her Majesty and her successors, a similar dish of ore for every third and subsequent meer which he shall reach of the vein in which he is working.

12. If any miner shall work any mine or vein without having duly freed the same as provided by the eleventh article, or shall commit any trespass in any meer belonging to the lessee of the duties of lot and cope, or to her Majesty and her successors, the mine or vein which shall have been so worked without having been freed, or the mine or vein of which the meer in which such trespass shall have been committed shall form a part, shall be forfeited to the lessee of the duties of lot and cope, and if there shall be no such lessee, then to her Majesty and her successors, and possession thereof may be recovered on behalf of such lessee or of her Majesty and her successors, as the case may be, by action of title in the small barmote court in the name of the barmaster.

13. If any vein shall cross another vein, the miner who comes to the pee or intersection first shall have such pee or intersection, and may work therein as far as he can reach with a pick or hack, such pick or hack having a helve or shaft three quarters of a yard long, so that he stands wholly within the cheeks of his own vein when he works such pee or intersection.

14. When two veins approach each other but are parted with a rither, and such veins continue asunder for one meer or further in length without any joint of ore or other mineral crossing the same (such joint of ore or other mineral not being a new vein), and the rither during that distance in all parts exceeds three feet in thickness, then they are to be considered and treated as two distinct veins so long as they so

continue asunder, but whenever they again meet the elder or prior title shall take the vein.

15. In any dispute where the priority of title shall come in question the longest continued ownership shall prevail, but all gifts from the barmaster shall be considered as the origin and commencement of the title, and workmanship prior to such gift (if any) shall not avail; and in all cases the jury on the trial shall decide the fact of such priority.

16. If any person shall claim title to any mine, the claimant may commence an action in the small barmote court, by causing a plaint to be entered in the book mentioned in the fifth section; and if any miner shall commit a trespass in the mine or vein of any other person, the person aggrieved may commence an action in the small barmote court, by causing a plaint to be entered in an action of trespass, and may proceed to trial in the small barmote court, and shall there recover possession of the said mine in the action of title, or damages to be assessed by the jury for the said trespass; and any person claiming a debt against a miner for articles furnished to a mine, or for mining purposes, or for work or labour in, upon or in respect of any mineral property, may cause a plaint to be entered in an action of debt, and shall annex the particulars of his debt to the summons, and proceed to trial in the small barmote court, and shall there recover such amount (if any) as upon proof shall appear to be due to him; but no evidence shall be admitted of any items in an action of debt not mentioned in the particulars annexed to the summons.

17. No miner or other person shall, except as hereinafter mentioned, bring more than one action of title to recover the same mine, and a nonsuit shall be deemed of the same effect as a judgment for the defendant; but in actions of trespass or debt the plaintiff, if nonsuited, shall be allowed to commence a fresh action; provided always, that the steward shall in any case whatever, whether of title, trespass or debt, have the power, if he shall think fit, to order a new trial to be had, upon such terms as he shall think reasonable, and in the meantime to stay the proceedings.

18. Every meer of ground shall contain thirty-two yards in length; and the miner shall be entitled to take and have set out for him any proportion of a meer, upon freeing the same, by payment of an amount of ore proportionate to the amount payable upon freeing a whole meer.

19. The barmaster, if he finds any mine or vein neglected and not wrought, and not hindered by water or for want of air, shall, if required so to do by any person or persons, send to the owner or reputed owner where known to him, and if not known to him, then put up in some conspicuous place within the liberty in which the mine or vein is situate, a notice

that such mine or vein will, at the expiration of three weeks, if not duly and reasonably worked to the satisfaction of the barmaster and grand jury, and no other sufficient reason assigned to them, be forfeited; and if at the expiration of the said three weeks the mine or vein is not so worked, the barmaster, in the presence of two of the grand jury, may give such mine or vein to any person or persons willing to work the same; provided that nothing herein contained shall authorize the barmaster to give away such mine or vein if the owner thereof be unable to work the same by reason of such mine or vein being under water, or for want of air, so long as the owner thereof is using efficient and diligent means to the satisfaction of the barmaster and grand jury to relieve such mine or vein.

20. If any person has shares in a mine, and refuses to join his partners or the owners of the other shares in working the same, or to pay his proportion of the expenses of working the same for the space of six days after the same has been demanded by the party complaining or his agent, he shall forfeit his part and share to his partners, who shall be entitled to recover the same against such defaulting owner in an action of title in the small barmote court, and the only evidence necessary in such action to enable the plaintiff to obtain judgment shall be proof that the plaintiff has worked the said mine, and the amount of the expenses incurred, and a demand of payment of defendant's share thereof as aforesaid, and the neglect or refusal of defendant to pay it for the space of six days after the demand; and it shall be no defence to such action that the plaintiff is partner or joint owner with the defendant in the mine or shares sought to be recovered.

21. If any person be possessed of any mine, and be working the same, and any other person claims title thereto, such claimant shall, within the space of three calendar months next after he shall have had notice of the same being in open workmanship, and at all events within six calendar months after the same shall have been in open workmanship, whether he shall have had notice or not, assert his claim by an action of title in the small barmote court, or else such claim shall be barred.

22. If the barmaster shall, in any matter connected with the duties of his office, require a view to be made by the grand jury, or if the plaintiff or defendant in any action of title or trespass in the small barmote court, or if any miner or other person shall for any purpose require a view to be made of the mine or works of any person whomsoever, then and in each and every of such cases a view shall be made, and the person so requiring a view shall, when the grand jury are assembled, deliver to the steward a bill of directions describing the mine or particular part or parts of a mine, or ground or

works, or other matters or things which the grand jury are required to view, and stating the question upon which their opinion is required, but such bill of directions shall contain no argument or comment whatever, and thereupon the steward shall openly read the said bill of directions to the grand jury, and, if the same is in the opinion of the steward properly framed, deliver it to one of the grand jury, who shall take the same with him for the guidance of himself and the rest of the grand jury in making their view; but if any person affected by the said proceeding object to the said bill of directions or to any cross bill delivered as herein-after mentioned as containing matter of argument, assertion, or comment not being a description of the mine, ground, or works, or other matters or things to be viewed, or a statement of the question necessary for the guidance of the grand jury in making their view, the steward before delivering the bill or cross bill to the grand jury shall in all cases decide upon the validity of such objections, and if he thinks the same well founded shall cause the bill or cross bill to be altered and corrected in such manner as the steward shall think right, and after making such view such of the grand jury as shall concur in opinion shall in answer to such bill and cross bill, if any, write their opinion and sign it, and such of the grand jury as shall not concur in opinion with any of their fellow jurymen shall write separate opinions and sign them, so that the signature of each of the grand jury shall be affixed either to his own separate opinion or to that of himself and some other or others of the said grand jury; and the said bill and cross bill, if any, with the opinions, shall be delivered to the steward, who shall thereupon openly read the same in the presence of the grand jury and of the person or persons who shall have preferred such bill or cross bill; and such bill and cross bill, if any, and the opinions thereon, shall be kept by the steward with the documents of the barmote courts, but the steward shall, if required by the plaintiff or defendant in the action in which the view shall have been had, permit such bill and cross bill, if any, and the opinions thereon, or either of them, to be used by such plaintiff or defendant for the purpose of evidence on the trial of the action: provided always, that no plaintiff or defendant in any action shall be entitled to require a view unless he shall have given notice thereof in writing to the barmaster six clear days at the least before the day appointed for the trial; and the expenses of views shall be paid in manner hereinafter mentioned, that is to say, in cases where the barmaster shall require such view the expense shall be borne by the owner of the mine or other matter to be viewed, provided the steward shall consider that such view was properly required by the barmaster, and shall allow such expenses; and in cases where the view shall be required by a plaintiff or de-

fendant in any action, the expenses of such view shall be costs in the cause, and abide the event of the action; and in all other cases the expenses shall be paid by the person requiring the view, if no cross bill is presented, and if a cross bill is presented, then in equal proportions by the person requiring the view and the person presenting the cross bill. Any person who may be affected by the proceedings at any view may appoint a shower to accompany the grand jury and to show on his behalf the place to be viewed.

23. Any person who may be affected by the opinion of the grand jury on any view may, if he thinks fit, at the same view deliver a bill of directions to the said grand jury, which second bill shall be called a cross bill of directions, in similar form to the original bill, stating the question on which their opinion is requested; and the steward shall in like manner, immediately after reading the original bill, read over such cross bill, and deliver the same to one of the grand jury to take to the mine or ground for the guidance of himself and the rest of the grand jury.

24. When a bill of directions and also a cross bill shall be delivered to the grand jury at the same view, it shall not be requisite for them to write their opinions until they have completed the view on the cross bill, unless they think proper to do so, and in no case shall it be competent for the grand jury to examine any evidence produced by either party.

25. If any person shall obstruct the grand jury in viewing any mine or works, the grand jury shall state such fact in writing, and return such writing signed by any one or more of them, together with the bill of directions, and cross bill, if any, to the steward, and the person so obstructing shall forfeit by way of penalty such sum not exceeding twenty pounds as the steward shall think fit to impose, and the steward shall have power to impose a fresh penalty every day on which such obstruction is repeated; and if any such penalty be not paid within three days after the same shall be imposed, the steward shall issue his warrant for levying the same. Before imposing any such penalty, the steward shall give to the offender seven clear days' notice to show cause, at a time and place situate within the hundred of the High Peak, to be named in such notice, why a penalty should not be imposed.

26. If any person shall, by virtue of any sough engine or other means, unwater or give relief to any mine or vein which may be under water and the further working thereof be hindered, the owner of any such mine so relieved shall from time to time, so long as such relief be continued, deliver to the person giving such relief as aforesaid such part and portion of all the ore which at any time thereafter shall be got and raised in such mine or vein under the level at which such relief was given, as the barmaster and grand jury may from

time to time fix and determine; such part and portion of the said ore to be delivered and dressed and made merchantable by the owner of such mine, without any fraudulent concealment or wilful diminution, and to be discharged and free from all charges in getting and dressing; and the value of such ore, if it shall not exceed fifty pounds, shall be recoverable in the county court, or, if such value shall exceed fifty pounds, in one of the superior courts at Westminster.

27. Any person having two or more veins lying contiguous to each other, or connected by any shafts, gaits or ways, may, with the consent in writing of the barmaster or grand jury, consolidate the titles to such veins, and an entry shall be made in the barmaster's book to the effect that the titles to such veins are thenceforth consolidated, and the said veins shall from the time of such entry in the said book be considered and treated as held under one; and the new title of the said consolidated veins, and nothing herein contained, shall prejudice or affect the right or title of any person to any mine or vein which may have been heretofore united to or consolidated with any other mine or vein, and that the possession or working of any of the mines or veins in such consolidated titles respectively shall be considered as the working of the whole thereof, and so long as any part thereof be so worked the same shall not be liable to be operated upon by the barmaster in pursuance of the nineteenth article.

28. If the grand jury shall be summoned to any view by any person, not being plaintiff or defendant, in any action in the small barmote court, for the purpose of delivering their opinion as to whether any other person is working in any mineral ground belonging to the persons so summoning the grand jury, and the majority of the grand jury assembled at any such view, and give it as their opinion that such is in all probability the case, but that for want of workmanship the fact does not yet clearly appear, it shall be lawful for the steward to require such other person to give to the steward security for the value of all ore which may be gotten in his workings thenceforth, until such time as sufficient working shall have been done to make the truth appear; and nuless security shall be given unto and to the satisfaction of the steward, it shall be lawful for him to direct and authorize the barmaster to retain all ore gotten in the workings of such other person so failing to give security, until such security shall be given, or until sufficient further working shall have been done to enable the grand jury at any adjourned view to form a satisfactory opinion; and if the grand jury assembled at any such adjourned view, or the majority of those so assembled, shall state their opinion to be that the workings of the person originally summoning the grand jury and of such other person form one and the same title, the steward

shall thereupon order the barmaster to deliver to the person who shall have originally summoned the grand jury the ore which shall have been so retained as aforesaid, or, if security shall have been given as aforesaid, then the person who shall have originally summoned the grand jury shall be entitled to the benefit of such security, to the extent of the value of the ore which shall have been gotten by such other person as aforesaid since the original view, and shall be entitled to use the name of the steward, if necessary, for enforcing such security, and if either party feels himself aggrieved, such party may prosecute his claim in the small barmote court.

Additional Customs and Articles for the High Peak District, made 5th April, 1859, *under* 14 & 15 *Vict. c.* 94, *s.* 56.

1. The word "buddling" shall be substituted for the word "briddling" in the 5th article of the "High Peak "Mining Customs and Mineral Courts Act, 1851," and the said 5th article be read and construed as if the word "buddling," and not the word "briddling," had been originally inserted therein.

2. On any person transferring any mine or vein, or any share or interest therein, to any other persons, the transferer and the transferee shall both execute a transfer in the words or to the effect following, namely:—"I, *A. B.*, of , in the county of Derby, lead miner, in consideration of the sum of £ paid to me by the said C. D., of , in the county of [Derby, lead miner,] do hereby grant, transfer and convey unto the said C. D., all that mine [*or* all those my three twenty-fourths shares of and in a mine] called the , situate in the liberty of , in the district of Kingsfield, in the hundred of the High Peak, in the county of Derby, and the rights, works and appurtenances connected with the said mine, and also the lead ore, and all tools, materials, goods, chattels and effects used in searching for, getting, cleansing or preparing lead ore, in or about the said mine; To hold the said mine [*or* the said shares of and in the said mine] unto the said C. D., his heirs and assigns, and [of and in] the said chattels unto the said C. D., his executors, administrators and assigns, subject to the provisions of the 'High Peak Mining Customs and Mineral 'Courts Act, 1851:' And I the said C. D. do hereby accept and undertake to hold the said mine [*or* the said shares of the said mine], chattels and premises, subject to the same provisions. As witness our hands and seals the

day of , in the year one thousand eight hundred and .

Signed, sealed and delivered by the above-named A. B. and C. D., in the presence of ."

And in such transfer the true consideration for the making thereof shall be stated in words at length, and on the transfer being presented to the barmaster or deputy-barmaster, duly stamped and executed, and proof being given to his satisfaction of the due execution thereof, and the barmaster or deputy barmaster shall enter such transfer in the book to be kept by him, as mentioned in the 14th section of the "High Peak Mining Customs and Mineral Courts "Act, 1851;" and every such transfer, when so entered, shall be valid and effectual, and the entry thereof in the barmaster's book shall be sufficient primâ facie evidence of the due making and execution of such transfer.

3. When any person entitled to any mine or vein, or any share or interest therein, shall become bankrupt or take the benefit of any Act for the relief of insolvent debtors, a certificate of the appointment of an assignee or assignees of his estate, when presented to the barmaster, shall be entered by him in his said book.

4. When any person entitled to any mine or vein, or any share or interest therein, shall die, having devised or bequeathed the same, the probate of his will and all codicils thereto (if any), or letters of administration, with his will and all codicils attached thereto (if any) annexed, when presented to the barmaster shall be entered by him in his said book, so far as the same relates to the devise or bequest of any such mine or vein or any estate or interest therein.

5. A miner who has raised ore shall not proceed to have his ore measured in the absence of the barmaster, under the 7th article of the "High Peak Mining Customs and Mineral Courts Act, 1851," unless the barmaster shall neglect or refuse to attend to measure the ore at a time and place of which the miner shall have given the barmaster three previous days' notice in writing.

6. The finder of any new vein shall be entitled to purchase, at such price as the barmaster and any two or more of the grand jury may fix and determine, the meer set out for the time being of the duties of lot and cope, or to her Majesty or her successors (as the case may be), under the 10th article of the "High Peak Mining Customs and Mineral Courts Act, 1851," if such lessee or her Majesty or her successors (as the case may be) shall neglect or refuse duly and reasonably to work such meer.

7. In all cases where the barmaster finds a mine or vein neglected or not wrought, from whatever cause, he may, on the application of any person or persons, deliver or send to

the owner or reputed owner of such neglected mine or vein the notice required by the 19th article of the "High Peak Mining Customs and Mineral Courts, Act, 1851," to be sent to such owner or reputed owner; and such notice may be delivered personally or may be sent by the barmaster by post directed to such owner or reputed owner. Where any of the owners or reputed owners of a mine or vein neglected and not wrought are not known to the barmaster, it shall be sufficient if the barmaster shall put up the notice required by the said 19th article on or near the mine, and also in some other conspicuous place within the liberty within which the mine or vein is situate, and shall deliver or send to any one of such owners or reputed owners as may be known by him (if any be known to him but not otherwise) a copy of such notice; and after the notice required by the said 19th article shall have been given as aforesaid, it shall be sufficient if the barmaster and two or more of the grand jury shall inspect the said mine or vein at the expiration of the three weeks mentioned in such notice, and shall sign a certificate that the neglected mine or vein has not been reasonably worked to their satisfaction, and that no sufficient reason has been assigned to them for not working the same, and, thereupon, the barmaster, in the presence of two or more of the grand jury, may give such mine or vein to any person or persons willing to work the same.

8. Instead of the space of six days limited by the 20th article of the "High Peak Mining Customs and Mineral Courts Act, 1851," a person having shares in a mine shall not forfeit his part or share to his partners unless he refuses to join his partners or the owners of the other shares in working the same, or to pay his proportion of the expenses of working the same, for the space of twenty-one days after the same has been demanded by the party complaining or his agent.

9. Where the owners or partners of or in any mine or vein exceed three in number, they may from time to time appoint and register with the barmaster an agent, being a partner or not, in whose name, when registered, actions may be brought and defended in the small barmote court, for and on behalf of the owners of the mine or vein; and upon a judgment or order against such agent, execution may be levied on the mineral property of the owners of the mine or vein on whose behalf the agent may sue or may be sued.

10. The actions of title which are authorized to be brought and maintained by the 20th article of the "High Peak Mining Customs and Mineral Courts Act, 1851," as varied by the 8th new article hereinbefore contained, may be brought and maintained in the name of such registered agent as aforesaid, for and on behalf of the persons who under the last two mentioned articles are entitled to bring and main-

tain actions of title in the small barmote court in the cases therein mentioned, and the persons on whose behalf such actions shall be brought shall be liable and entitled in the same manner as if such actions had been brought and maintained in their own names.

11. The plaintiff or defendant in any action shall not be entitled to require a view, unless he shall have given notice thereof in writing to the barmaster ten clear days at the least before the day appointed for the trial, instead of six clear days as required by the 22nd article of "High Peak Mining Customs and Mineral Courts Act, 1851."

12. The title to veins shall not be consolidated under the 27th article of the "High Peak Mining Customs and Mineral Courts Act, 1851," excepting with the consent in writing of the barmaster and grand jury.

There are also additional rules and orders, made on the same occasion, relating to the practice and process of the mineral courts.

For the customs of Hassop, Rowland and Calver, see Hardy, p. 46.

For the customs of Cornwall and Devon, see "The Laws and Customs of the Stannaries," by T. Pearce, 1725.

Part III.

GLOSSARY OF ENGLISH MINING TERMS (*a*).

Adit—A level—a horizontal drift or passage into a mine, by which it is entered and unwatered.
Adlings or *Adelings*—Earnings, v. *Adle.*
Adventurers—Shareholders.
After-damp—See *Choke-damp.*
Air-head—A channel driven on a level with the top of a gate-road, in the ten yard coal, and parallel to it.
Air-pipes or *Boxes*—Tubes or pipes for ventilation.
Aitch-piece—That part of the pipes of a forcing pump in which the valves are placed.
Arch—Ground unworked near a shaft.
Arles—Earnest money, in binding men.
Arrage—A sharp point or corner.
Attle—Refuse.
Average produce—The quantity of pure or fine copper in 100 parts of ore, in Cornwall.
Average standard—The price per ton of pure or fine copper in the ore.
Average weight—The mean weight of a tub of coals for a certain period, on which wages are calculated.
Baby—A balance weight near the end of a pit rope.
Back—As to lode or vein, the part nearest the surface; also, a branch from a main vein like the segment of a circle; as to an adit, the part of the vein above it; also, the natural transverse cleavage of rock; also, the diagonal parting in coal.
Back-end—The remaining half of working coal after the first blast.
Baching-deals—Wood behind cribs for supporting the earth.
Back-shift—The second set of coal hewers in each day.
Back-skin—A leather covering for miners in wet places.
Baff-end—A bit of wood for driving behind cribbs or tubbing.
Baff-week—The alternate week after the pay-week.
Bait—A pitman's provisions.
Bal—A mine.
Balk—A kind of hitch producing a nip. See *Hitch* and *Nip;* also, strong timber; *running* B., set in the direction of a drift at its side, to support the cross balks.
Baln stone—Roof-stone.
Band—Stone interstratified with coal.

(*a*) The author is much indebted to a Glossary, published by the proprietor of the *Mining Journal,* for the Cornwall words. That of Mr. Greenwell is an excellent epitome of the Northern coal trade.

Bandsman—The loader of the coal.
Bank—The surface at the pit's mouth.
Banksman—The man who brings the waggon to the surface.
Bar of ground—An intersecting vein of different mineral substances.
Bargains—The periodical and other contracts with miners.
Bar-grip—Applied to a vein closing.
Barmaster—See *Index*.
Barmote—A mining court.
Barrier—A thick wall of coal left between two mines.
Barrow-man—See *Putter*.
Basker—Old cloth used in boring wet holes.
Basset—The appearance of strata to the day; also, the upper end of mining works.
Batch of ores—The ore sent up by any pair of workmen.
Batework—Short work.
Bating—Lowering a drift or road.
Battery—An embankment.
Beans—A kind of small coals.
Bearers—Supports to engine pumps in the shaft.
Beater—A tool for charging a blast.
Beche—(pron. bitch)—A boring tool.
Bed—A horizontal seam or deposit of mineral; also, the foundation of wall or other work.
Belland—Dusty lead ore; also, a disease incurred by cattle in lead districts.
Bellies—Deposits of ore.
Benching up—Working on the top of coal.
Bend—Hard clay, or other hard substance.
Bend away—A signal for raising up.
Bender—A bit of iron attached to cylinders for a pit rope, or the trunks. See *Trunks*.
Benh—The face of the coal in work.
Biard—See *Bearer*.
Bildas—The extra work of pitman for the butty. See *Butty*.
Bina—Hard clayey substance.
Bind—Sandstone, or hard shale.
Bing—Eight hundredweight.
Bing-hole—A hole through which ore is thrown.
Bing-place or *Bing-stead*—Where the ore is laid ready for smelting.
Bit—The steel end of a boring implement.
Black jack—Blende, or sulphuret of zinc.
Black metal—See *Plate*.
Black tin—Tin ore fit for smelting.
Blanch—Lead ore mixed with other minerals.
Blast—The air supplied to a furnace; also, a shot.
Blast-holes—The holes of a windbore, or pump bottom.
Blasting—Breaking rocks or coal by gunpowder.
Bleas—See *Plate*.
Blind coal—Anthracite.
Block tin—Metallic tin.
Blower—A smelter; also, a great discharge of gas from a fissure.
Blowing—Blasting.

Blue John—Fluor spar.
Board or *Board gate*—Applied to a level transverse to the grain or face of coal.
Board room—The width across an old board.
Bob—The engine beam.
Boles or *Bayle hills*—Ancient smelting places.
Boll—A measure of 9676·8 cubic inches, or 34·899 imperial gallons.
Bolt hole—A passage from a gate road into a side of work.
Borer—An instrument for boring or perforating mineral ground.
Boulder—A fragment of rock brought by natural means from a distance.
Bounds—A tract of tin ore ground.
Bout—A mode of measuring lead ore in Derbyshire; twenty-four dishes.
Bovey coal—Lignite or charred wood.
Bow—A bit of iron in a waggon for letting it down a pit; also, see *Bender*.
Bowke—A small wooden box for drawing clay and ironstone, and for sinking.
Bowse—Lead ore as cut from the vein.
Brace—The platform over the mouth of a shaft.
Bracehead—A piece of timber for connecting boring rods.
Brake—A lever used in boring; also, a band of iron pressed on a wheel to check or stop it.
Brakesman—The man charged with the winding engine.
Brake-sieve—A sieve used in washing ore.
Branch—A small separating vein.
Brasses—Sulphate of iron in coal.
Brat—A thin bed of coal mixed with pyrites or carbonate of lime.
Brattice—A wooden partition for ventilation.
Brazil—Iron pyrites.
Breakes—Fissures in old coal workings.
Breakings—The poor part of ore ready for being crushed.
Breast—The face of coal workings.
Brenner—A smelter.
Brettis—Timber or boards packed and filled up with rubbish.
Broadgate—A main working.
Broken—A part of a coal mine where the pillars are being removed.
Brood—Impure matter mixed with ore.
Browse—Ore imperfectly smelted, mixed with cinder and clay.
Bryle—The traces of a vein, in loose matter, on or near the surface.
Bucker—An ore bruiser; also, the instrument used by him.
Bucket—The piston of a lifting pump.
Bucket-lift—The iron pipes of a lifting pump.
Bucket-rods—Wooden rods to which a piston is attached.
Bucking-iron—A pulverizing tool.
Bucking-plate—The iron plate for the ore to be bruised.
Bucklers—Small chains put round coals.
Buck-up—Contribution by shareholders.
Buddle—A frame of wood used in
Buddling—Separating or washing ores. See also *Caving*.
Bule—A bit of iron put round pistons.

Bull—A round tapering iron bar used in keeping water from blast holes.
Bunch of ore—A small deposit.
Bunding or *Bunning*—A platform for holding or delivering minerals.
Bunton or *Bunting*—A strong piece of timber.
Burden—Matter on a bed of stream tin ore.
Burning house—Furnace for calcining tin ores.
Burr—Solid rock.
Burrow—A heap of refuse.
Butty—A collier contracting by weight or measure.
Cage—A shaft carriage; also, the barrel for a whim rope.
Cakes of ore—Flat masses.
Cal—Wolfram, or tungstate of iron.
Calcining—Roasting iron ore.
Calling course—The time for the men to go to work.
Canch—A part of a bed of stone worked by quarrying.
Cand—Fluor spar.
Cap—A flat piece of wood between the punch top and the roof of a mine. See *Punch*.
Cap-head—A top for an air-box used in sinking.
Capel—A composite stone of quartz, schorl and hornblende.
Captain—A manager of a mine.
Captain dresser—A manager of ore-dressing.
Carrack—See *Capel*.
Case—Applied to the broken state of a vein.
Cases of spar—Intersecting veins of quartz.
Cash—A soft band. See *Band*.
Casing—A division of planks.
Cast-hole—The first diggings in a shaft.
Cat-dirt—A substance of clay, coal and iron pyrites, or soft toadstone.
Cathead—A small capstan; also, a nodule of iron ore.
Caunter lode—A vein inclining with other veins.
Caving—The gleaning of ore from old heaps.
Cawk—Sulphate of barytes.
Chacing—Following a vein by its range.
Chair—Used in drawing up materials.
Chaldron—53 cwt. or 22·526 bolls; by statute, 36 bushels, or 28·266 cwt.
Charger—A tool for charging blasting holes.
Charter-master—See *Butty*.
Chats—Small pieces of stone with ore.
Check—Applied to a vein closing.
Cheek—The side or wall of a vein.
Chert—Nodular flint stones.
Chill—Vibration of rock on being struck.
Chimming—A process like tossing for smaller quantities of ore. See *Tossing*.
Chipper—Ore dresser.
Chock—A bit of wood for stopping engines.
Chock and Block—Tightly filled up.
Choke-damp—Foul air, carbonic acid gas, produced after explosions.

Chun—An open chasm in a vein.
Churn-drill—A large long drill, chisel-pointed.
Clack—A pump valve.
Claggy—Adhesive.
Clam—A bracket or support for a pump.
Clauncher or *Clanger*—A tool for cleaning blast holes.
Cleading—Deals nailed to timber.
Clearer—A collier who holes under the coal.
Cleat—A vertical joint in coal or stone.
Cleet—A wedge.
Clippers—A hook used in sinking.
Cliviss or *Clives*—A bit of turned iron, with a spring, for fastening a kibble to a rope.
Clunch—A hard argillaceous stratum.
Cob—To break ore with hammers, separating the worthless parts.
Cockle—Schorl, a mineral.
Cod—The bearing of an axle.
Coestead or *Coe*—A small building.
Cofering—Securing a shaft from water by clay.
Coffin—Old workings open to the day.
Cog—A small square building of stone or coal for supporting the roof in holing.
Collar or *Collaring*—Timber securing the pumps or upper parts of a shaft.
Collar-launder—The pipe at the top of a lift of pumps for carrying water to a cistern.
Connecting-rods—The large rods of an engine beam.
Consideration—Money paid to miners for bad coal, or for extra work.
Cope—A customary payment in money. See *Index*.
Coper—The person agreeing to pay cope.
Corder—The man who makes and repairs corves.
Core or *Coor*—A period of 6 or 8 hours' work by miners—4 or 3 to the day of 24 hours.
Corf—A square wicker frame for loading coals; also, a sledge for carrying ore to the shaft bottom.
Corf-bow—The handle of a corf.
Cost-book—See *Index*.
Costeaning—Discovering veins by sinking shafts, and driving transversely.
Country—The ground traversed by a vein.
Coup—To overturn; also, to exchange.
Course of ore—The part of a vein containing the ore.
Coursing—Conducting the air in different directions by means of doors and stoppings.
Cover—The box for removing ore from the vein; also, the place at the head of a trunk. See *Trunk*.
Cow—A fork of wood or iron behind the last waggon for preventing sliding back.
Crab—A capstan for raising weights in a shaft.
Cradle—A scaffold suspended in a shaft.
Cramp—A pillar of rock or mineral left for support.
Crampet—A bracket.
Cranch—Part of a vein left by old workers.

Crease—A division of buddled work.
Creep—A rising of the floor of a mine, occasioned by the weight of incumbent strata, in pillar working.
Crib—A circular wooden frame, used in pulverizing ore in a shaft; also, for bricking a shaft.
Crop—The best ore; also, the basset or outburst of strata at the surface; also, to leave coal at the bottom of a bed.
Cross-course—An intersecting vein.
Cross-course-spar—Radiated quartz.
Cross-cut—A level driven directly across the course of a vein; also, at an angle with the grain of coal.
Crosses and holes—A mode of marking the ground before setting stowces. See *Index*.
Crow coal—Inferior coal; also, the uppermost bed of coal.
Crown tree—A plank for supporting the roof of coal.
Crush—The falling in of coal pillars.
Crushing—Grinding ores with water.
Cupelo or *Cupola*—A small furnace.
Curb—See *Crib*.
Cut—To intersect a vein.
Cutters—Intersecting joints in rocks.
Cutting—An air course at either end of the work, after the coal is worked out; also, working coal by vertical hewing.
Cuttings—Refuse of the bowse. See *Bowse*.
Dacker—Applied to want of air.
Dam—Choke damp, or foul air.
Damp sheet—A large coarse sheet for diverting air.
Dan—A square frame of wood for drawing coals.
Dant—Soft inferior coal.
Darg—A quantity of coal to be worked at a fixed price.
Dashing—Applied to raising air to prevent explosions.
Davy lamp—The safety lamp invented by Sir H. Davy.
Dawlings—Rich veins becoming poor.
Day—The surface.
Day-hole—A level from the surface.
Day-water—Water from the surface.
Dead—Unventilated; also, as to a vein or ground, unproductive.
Deads (pron. *Deeds*)—Refuse.
Deaf ore—Light whitish substance, with grains of ore.
Dean—The end of an adit.
Deep level—The deepest level communicating with the engine shaft.
Deputies—Men employed to secure mines from accidents.
Dialling—Surveying.
Dileuing—Washing ores on a hair-bottomed sieve.
Dip—The line of declination of strata.
Dippa—A small pit.
Doit—Foulness, or fire damp.
Dish—The landowner's or lord's part of the ore, in Cornwall; a measure of 14, 15 or 16 pints, in Derbyshire.
Dissueing—Breaking down the sides or walls of a small vein, so as to take it afterwards without waste.
Divining rod or *Dowsing rod*—A hazel rod used for discovering veins.
Doggy—An underground superintendent; also, the deputy of a butty collier.

Dog-hook—A long hook for drawing an empty waggon.
Dogs—Bits of wood at the bottom of an air-door; also, the part of the chain fastened to a rope.
Doorstead—Upright timber in the sides of levels for support.
Dotts or *Dott-holes*—Small openings in the vein.
Douk or *Donk*—A soft clayey substance.
Dowell—An iron bolt.
Down-cast—Applied to a pit down which the air passes; also, to a dyke, where the coal is underneath.
Dradgy ore or *Drady trade*—Coarse matter, with little ore.
Draught—The quantity of coals brought to bank at a certain time.
Dredge sump—A reservoir of water for the purification of air passed through it.
Dressers—Ore cleaners. Also, see *Loading pick.*
Drift—A horizontal passage underground.
Drill—An implement for boring holes.
Drink-time—Meal-time.
Driver—A bit of iron for forcing the wood into a blasting hole.
Driving—Digging horizontally.
Drop—The quantity of coal fallen at one cutting; also, the apparatus for shipping coals in the waggons.
Dropper—A branch leaving the main vein.
Druggon—A square box for lowering water to the mine.
Drum—The cylinder for winding the rope.
Druse—Hard concreted stony crust on the sides of caverns.
Duff—Small coals after separation of the nuts. See *Nuts.*
Durns—A framework of wood for keeping the ground open in shafts and adits.
Duty ore—The landlord's part.
Dyke—A vein of extraneous rock.
Dzhu—To dig away part of the end of the rock to be blasted, for a better blast.
Elvan—Mineral.
Elve—The handle of a pick.
End—The head of an adit, applied to an adit driven in a line with the grain of the coal.
Ending—An adit driven in a direction with the grain of the coal.
End-joints—See *Cutters.*
Erles—Earnest money.
Eye—A top of a shaft.
Face—Applied to coal at right angles with the grain; in iron mines, the work in progress; also, the end of workings.
Famp—Soft tough thin shale beds.
Fang—A niche cut in the side of an adit or shaft for an air-course.
Fanging—A main of wooden pipes.
Fast—The firm rock below the soil or covering.
Fast-end—The part of the coal bed next the rock.
Fault—A dislocation of the strata.
Fausted ore—Refuse lead ore, for finer dressing.
Feeder—A small vein joining a larger vein; also, a spring or stream.
Feigh—Refuse.
Fighting—Applied to reversed ventilation.
Fillating—Wood stringing.

Fire-damp—Light carburetted hydrogen gas.
Fire-stink—The stench from decomposed iron pyrites.
Fitter—The person who sells coals at the shipping port: *Fitting*—the business of a fitter: *Fittage*—the expenses in selling coals.
Flang—A two-pointed pick.
Flange—Applied to a vein widening.
Flat—A horizontal vein; also, the end of the horseway, where coals are brought.
Flat rods—Engine rods for horizontal motion.
Fleaing—Thinning the pillars of coal before abandonment.
Float ore—Waterworn particles of ore.
Flookan—Clayey matter in the veins; a vein or course of clay.
Floran tin—Tin ore scarcely visible in the stone, or stamped very small.
Fluke—The head of the charger, used for cleansing the hole before blasting.
Fother or *Fodder*—As to lead, 19½ cwt. in London, 20 cwt. in Bristol, 21 cwt. in Newcastle-on-Tyne, 22 cwt. in Stockton, 2,340 lbs. in Hull, 2,400 lbs. in Chester and Liverpool, 2,520 lbs. in Derby; as to coals, one-third of a chaldron.
Foal—A lad employed with the putters. See *Putter*.
Foot-hook—The large hook at the bow of a waggon for drawing coal up a shaft.
Foot-wall—The wall under the vein.
Footway—The ladders for the workmen.
Forcepiece—A piece of timber put diagonally, for keeping the ground open.
Forefield—The face or extent of the workings.
Forefield end and *Forehead*—The furthest extent of the workings.
Forewinning—Advanced workings.
Fork—The bottom of the engine shaft; *water in fork*—the water all drawn out; also, a piece of wood for keeping open the side of a shaft or drift.
Foulness—See *Fire-damp*.
Foundermeer—The first 32 yards of ground worked (Derbyshire).
Foundershaft—The first shaft sunk.
Freeing—Entering a mine in the barmaster's book (Derbyshire): *Freeing dish*. See *Dish*.
Furtherance—The extra price paid to hewers of coal, when required as putters.
Fuzze—Straws, reeds or hollow vegetable substances filled with powder; from *Fuze*.
Gad—A pointed wedge with parabolic sides.
Gait—A journey or trip.
Gale—A grant of mining ground.
Galiage—Royalty.
Gallery—A level or drift.
Gang—A mine; also, a set of miners.
Gang-art—Side of a mine.
Gangway—A level; also, a wooden bridge.
Garland—A trough or channel round the inside of a shaft for catching water.
Gash—Applied to a vein wide above, narrow below.

Gate—A road or way underground for air, water or general passage.
Gate-road—A wide passage on the floor of the coal.
Gaveller—A mine bailiff or steward in the Forest of Dean.
Gavelock—An iron poker or lever.
Gear—Working implements.
Gears—The trapping of a horse.
Gig—A small sump. See *Sump.*
Gin—A small engine for working shallow mines.
Ginging—Arching a shaft to prevent cattle from falling in.
Girdle—A thin bed of stone.
Glist—Mica.
Glut—Wood for filling up space in cribbing. See *Crib.*
Goaf—Part of the mine from which all the coal has been worked.
Gobbing or *Gob*—The refuse, after extraction of coal.
Good levels—Levels nearly horizontal.
Gossan or *Gozzan*—Oxide of iron and quartz.
Grace o' God—An accidental discovery of a vein of ore.
Grain tin—Crystalline tin ore; metallic tin smelted with charcoal.
Grass—The surface.
Griddle—A sieve.
Grinder—Machine for crushing ore between iron cylinders.
Grip—A small narrow cavity.
Groove or *Grove*—A mine.
Ground—The rock or bed in which the vein is.
Ground bailiff—The superintendent of mines.
Growan—Decomposed granite; sometimes, the granite rock.
Gubbin—A kind of ironstone.
Gudgeon—A bit of wood used for roofing a mine.
Gullet—An opening in the strata.
Gulph of ore—A large deposit of ore in a vein.
Gunnies—Levels or workings.
Gurt—A gutter.
Hack—A large pick.
Hade—The inclination of a vein.
Half-marrow—One of two lads required for the work of one putter.
Halvanner—The dresser of the
Halvans—Ores much mixed with impurities.
Hand-gears—Small winding hand cylinder for shallow works.
Hangbench—Part of the stowces. See *Stowces.*
Hanger-on—The man who hangs the waggon at the foot of the shaft.
Hangingside or *Hanging wall* or *Hanger*—The wall or side over the vein.
Hauling—Drawing ore or refuse out of the mine.
Hazel—Freestone.
Head-sword—The water running through an audit.
Heading—The vein above the drift.
Headsman—See *Putter.*
Headtree—Timber on the roof of a level for support.
Headway—A passage driven in the direction of the grain of the coal.
Heap—The refuse at the pit's mouth.

Heapkeeper—A man charged with the cleaning of coals at the surface.
Heapstead—The height at a pit's mouth.
Heathen—Applied to bed of coal immediately below the 10 yard coal, Staffordshire.
Heave—The horizontal dislocation of one vein by another.
Hewer—A miner who cuts or works the coal: *Hewing*—working the coal.
Hitch—Dislocation of veins or strata.
Hogger—A leathern pipe for delivering water.
Hogger-pump—The uppermost pump in a sinking pit.
Hoggers—Stockings without feet.
Holing—The working of a lower part of a bed of coal for bringing down the upper mass.
Hook-handles—The handles of a windlass.
Hopper—A sluice at the foot of underground workings for regulating the contents of a waggon; also, a place of deposit for small coals.
Hoppet or *Hopper*—The Derbyshire dish. See *Dish.*
Horn—Applied to a *line* running at an angle of forty-five degrees with the face of the coal.
Horns—Guides for the drum rope.
Horse—The dead ground between two branches of a vein near their separation.
Horse-arm—The part of a whim to which the horses are attached.
Horse-back—A part of the roof or floor intruding into the coal.
Horse-fettler—The man who has the care of the horses underground.
Horse-head—A wooden box used for ventilation.
House of water—A cavity or space filled with water.
H piece—See *Aitch piece.*
Hulk—See *Dzhu.*
Hushing—Discovery of veins by accumulation and sudden discharge of water.
Hutch—A cistern or box.
Inbye or *Inbyeside*—Further into a mine.
Intake—The airway for fresh air.
Into the house—The upstroke of a pumping engine.
Irestone—Hard clay slate; hornstone; hornblende.
Jackanapes—Small rollers between the rope rolls and pulleys.
Jackhead pit—A well or small shaft sunk within a mine.
Jackhead pump—The house water pump of an engine.
Jackhead set—The pumps in the
Jackhead staple—A small pit for the supply of fuel for the boilers.
Jack-roll—A hand windlass.
Jagging—A mode of carrying ore to the smelt-mill in bags on horseback.
Jig-chain—A chain hooked to the back of a waggon.
Jig-pin—A pin for stopping the drawing machine.
Jigger—Cleaner of ores by
Jigging—Separating the ores with a wire-bottomed sieve, the heavier particles passing through.
Jowl—A noise made by beating at each end of two drifts expected to meet.

Judd—A part of the whole coal, or of a pillar of coal ready to be worked: *Trail judd*—a drift for the main judd.
Judge—A staff for measuring coal work underground.
Jumper—A long boring implement.
Junket—See *Kibble.*
Junking—A passage in a pillar of coal.
Kavels—Lots cast by miners for the working places.
Kebble—Opaque calcareous spar.
Kecker—An inspector.
Keckle-meckle—The poorest kind of lead ore.
Keel—A large river boat.
Keeps—Moveable frames or brackets of iron near the top of a shaft.
Keeve—A large vat.
Kenner—A signal for giving up working.
Kevil—A substance found in veins containing carbonate of lime, flour and barytes.
Kibble—A bucket for drawing ore to the surface; also, a small rubbish tub.
Kibble-filler—The man sending up the produce or refuse.
Kicker—Ground left in first cutting a vein for support of its side.
Kiles—Leathern strings for chains.
Killas—Clay slate.
Kingpost—Apparatus for strengthening a beam.
Kink—To curl into knots, as ropes.
Kirving—The holding made in the bottom of the coal before blasting it.
Kit—A wooden vessel.
Kitty—A piece of straw used in blasting.
Knits—Grains of lead ore.
Knob—A small support for the roof.
Knock-back ore—Ore mixed with barytes or kevil.
Knocking up—The calling up of miners by beating the landing waggon.
Knockings—Lead ore with spar, as severed.
Knockstone—A stone or piece of iron for breaking lead ore on.
Laid out—Applied to a corf forfeited.
Laired—Choked with mud.
Lamb and slack—Refuse coal.
Lames hirting—Taking coal from the side of a passage to widen it.
Land-sale—Coals sold at the pit's mouth for home consumption.
Lander—The man at the mouth of the shaft who receives the bucket.
Landing—The arrival of a waggon at the surface.
Landry box—A box at the top of a set of pumps for the delivery of water.
Lappior—The dresser of the poorer ores after the best are taken.
Laths—The boards behind the durns. See *Durns.*
Launders—Open water conduits.
Lazy-back—The loading place for coals at the surface.
Leader—The gut of a hitch or dyke.
Leader of the lode—A small vein, part of the main vein.
Leadings—Small sparry veins in the rock.
Leap—Applied to a vein intersected and found again.
Learies—Empty places, old workings.

Leat—A watercourse.
Leath—Applied to the soft part of a vein.
Leavings—The ores left after the crop is taken. See *Crop*.
Ledger—Applied to the lower side of a vein.
Lencheon—A shelf of thin rock caused in sinking a shaft.
Length—A certain portion of a vein when taken.
Level—A horizontal passage or drift into a mine for entering and unwatering it; in Cornwall, a gallery or drift in the vein below the adit level; also, channels for water.
Lid—See *Cap*.
Lidded—Applied to the contracted top of a pipe vein.
Lift—A creep; a column of pumps; a broken judd. See *Judd*.
Lifters—The beams of a stamping or crushing mill.
Limmers—The shafts by which horses draw.
Limp—An iron plate for striking the refuse from the sieve in washing ore.
Lining—Dialling.
Loading pick—A pick for clearing the worked coal.
Lobbs—Underground stairs; also, applied to a vein irregular in descent.
Loch—A cavity in a vein.
Lock-piece—A piece of timber for supporting the workings.
Lode—A mineral vein.
Lode-stoovan—An open cutting towards a vein in rising ground.
Lofting—Wood for holding up loose stones in timbering mines.
Log—See *Baby*.
Long wall—Taking all the coal at once.
Loobs—Slime containing ore.
Lost levels—Levels not horizontal.
Lot—The lord's dues.
Lough—See *Loch*.
Lowe—A light.
Lum—A chimney of an upcast pit.
Lumb—A hole at the foot of a shaft for collecting water.
Machine whim—A rotary steam engine for winding.
Maintainer—A shareholder.
Makings—The small coals hewn out in kirving. See *Kirving*.
Mallet—An implement used in boring.
Mallon or *Mallion*—A soft kevil. See *Kevil*.
Man of war—A small pillar of coal left in a critical spot; also, a principal support in thick coal workings.
Mandrell—A pick for undermining.
Marrow—A partner in working.
Maul—A large hammer.
Meat earth—The vegetable mould.
Meer or *Meare*—See *Index*.
Meetings—The middle of a pit or inclined plane.
Mell—A large hammer.
Metal—In coal mines, shale.
Metal rig or *ridge*—The strata forced up by a creep.
Metal stone—Shale mixed with sandstone.
Midfeathers—Applied to a level cut from the middle of a shaft.
Mistress—A lantern closed in front, used in currents of air.
Mobby—A leathern girdle with chain and hook, worn for drawing iron ore from low places.

Mock ore—Blende.
Moorstone—Granite.
Mothergate—The main passage in a district of workings.
Mucks—See *Smut.*
Mudds—Small nails.
Mundic—Iron pyrites.
Nail—See *Needle.*
Navvy—The part of the face of an ironstone mine between two roads.
Needle—A long piece of copper or iron used for making an aperture in blasting.
Nicking—The holing made by hewers in the side of the coal; also, see Chapter on Derbyshire customs.
Nickings—The small coal worked in nicking.
Nip—The effect of creeps on pillars of coal; a crush; a natural thinning of seams.
Nittings—The refuse of good ore.
Noger—See *Jumper.*
Nogs—Square bits of wood piled to support the roof of coal mines.
Noper—See *Loading pick.*
O'er layer—A piece of wood for the sieve after washing the ore.
Off-putter—A man employed in shipping coal.
Off-take joint—The joint by which the bucket is fastened to the rods.
Old man—Ancient workings.
On-setter—A man who sends coal from the bottom of the pit.
Open cast—Applied to veins or beds worked at the surface.
Open work—A quarry.
Openings—The parts of coal mines between the pillars, or the pillars and ribs.
Opens—Large caverns.
Ouges—The solid rock on the side of a vein.
Out of the house—A pumping engine in the down stroke.
Outbye, Outbyeside—Nearer to the bottom of a pit.
Outcrop or *Outburst*—See *Crop.*
Outset—The height of the pit above the surface.
Outstroke—See *Index.*
Overburn—See *Burden.*
Overgate—The crossing of an airway.
Overings—The top framing of a waggon.
Overman—An agent; a daily manager.
Overworkings—The excess of mineral produce uncovered by a certain rent.
Owner's account men—Workmen paid by the day (Cornwall).
Pack—To accelerate the subsidence of the ore in the process of tossing, by beating the vessel with a hammer—see *Tossing;* also, materials piled to support the roofs of coal mines.
Pair—A gang or party of men.
Pair of gears—Two upright props joined at the top for support of the roof, or for bridges or staiths.
Parcel—A heap of dressed ore ready for sale.
Parting—A small joint in coal; also, applied to a road leading from another.
Pass—An opening left for communicating with a level.

Peach—Chlorite.
Peasy—Applied to small parcels of ore that may be weighed by the hand.
Peck—A measure of 1,209 cubic inches.
Pedn cairn—A deposit of ore distant from the vein.
Pee—A bit of lead ore; also, intersection of a vein.
Picker—A hand chisel for dzhuing. See *Dzhu.*
Pikeman—a man who holes or cuts the coal.
Pillar—A mass of coal or mineral left to support the roof of a mine or the side of a vein.
Pinch—A lever.
Pipe—Applied to a vein when horizontal like a stratum; also, to thin irregular layers of coal.
Pitch—The limits of the ground set to tributers. See *Tributers.*
Pitch-bag—A bag used for keeping gunpowder.
Pit-eye pillar—A solid piece of coal left round the bottom of shafts.
Pit-frame—The framework carrying the pit pulley.
Pitman—A man employed to examine the lifts of pumps and the drainage (Cornwall); a working miner (coal districts).
Pitwork—The pumps and other apparatus of the engine shaft.
Placing work—Distribution of work among putters. See *Putter.*
Plat—Ground taken for ores or refuse.
Plate-shale—A hard argillaceous bed.
Plumb—Measuring line; also, perpendicular.
Plunger—The piston of a forcing pump.
Plunger lift—The set of pipes attached to a forcing pump.
Plug-man—A man in charge of a pumping engine.
Poker—See *Picker.*
Point of the horse—The point where a vein divides into branches.
Poling—Wood used for preventing falls of earth; also, for penetrating old loose workings.
Pol-roz—The pit under a water wheel.
Pont—A long implement for drawing out timber.
Post—A stratum of stone; also, see *Pillar.*
Pot-growan—Decomposed granite.
Prian—Soft white clay.
Pricker—See *Needle.*
Pricker and Puller—A long sharp pointed instrument for breaking the spurns. See *Spurns.*
Pril—A piece of solid metal; the button of an assay.
Pringap—The distance between two mining possessions, in Derbyshire.
Produce—The marketable ores or minerals; in Cornwall, fine copper in 100 parts of ore.
Punch—A piece of timber for supporting the roof; also, see *Pont.*
Punch-prop—A short prop for the roof.
Purchaser—See *Caver.*
Purser—The cashier at the mine.
Putter—A young man who conveys coal from the workings to the horseway.
Quarter—The fourth part of a yard.
Quarter cord—See Chap. XVI.
Queere—A small cavity or fissure.
Quick—Applied to a productive vein.

Race—A small thread of spar or ore.
Rachel or *Rachen*—Small fragments of rock.
Rack—An inclined frame on which the ores are washed and separated from the slime.
Racking—See *Rack*.
Rake—Applied to a vein when oblique or vertical.
Ramble—A thin shale bed on the top of a coal seam.
Random—The direction of a rake vein.
Rapper—A lever at the top of a shaft or inclined plane, for signals from the bottom.
Ratchell—Loose stones.
Rate—The sides of underground works falling.
Reed—Gorse or other vegetable tube used for a train of gunpowder in blasting.
Refining—Separating the ores.
Regulator—A frame with slides for ventilation.
Relief—A workman taking the place of another.
Renk—The average distance coals are brought from the workings.
Rests—The machinery at the top and bottom of a pit for supporting the shaft carriage in changing the tubs.
Rib—A pillar of coal left for support; a barrier of coal left between successive sides of work; the solid ore of a vein.
Ricket—See *Fang*.
Ridding—Clearing away rubbish.
Riddle—A sieve.
Ride—To ascend a pit.
Rider or *Rither*—The concrete compound matter or mineral in a vein, not ore, but the matrix of ore; called *flowery*, when adhering to the side of a vein and carrying ore.
Right running—Applied to a vein carrying ore in beds often unproductive.
Ring—A circular piece of iron used for increasing the load of a waggon; also, a channel for waste water.
Ringer—A crow-bar.
Rise—An upward working; an upthrow.
Rising—Working upwards.
Robbing—Working part of the pillars left for support.
Rodney—A rude platform near the pit's mouth for a night fire.
Roll—See *Balk*.
Rollers—Grooved iron wheels on inclined planes, for supporting the rope and lessening friction.
Rolleys—Carriages for carrying the tubs underground.
Rolley-way—Underground horse road.
Roofing—Applied to a loaded waggon wedging against the top of an underground passage.
Roof work—Applied to a vein worked overhead.
Rope-roll—A cylinder for winding rope.
Round coals—Large coals.
Row—Large rough stones.
Royalty—The dues of the lessor or landlord.
Rubble—Loose stones.
Rullers—The workers of the wheelbarrows underground.
Run—The natural falling or closing together of underground works; also, the direction of a vein.

Runner—A small stream; also, a landing waggon at the surface; also, applied to accidents to the winding apparatus.
Rush—See *Reed.*
Rusty—Applied to coals discoloured by water or exposure.
Sagre or *Segar clay*—Fire clay.
Scaffold—A platform within a mine for working on.
Scal—A shale or part of the earth or rock separating and falling.
Scale of air—Air abstracted from the main current.
Scamy—Applied to freestone in thin layers, mixed with mica.
Scares—Thin layers of pyrites or spar interstratified with coal seams.
Scovan lode—A vein without oxide of iron or quartz on or near the surface.
Scouring bit—A piece of iron at the end of the boring rod for extracting rubbish.
Scraper—A piece of iron for cleaning the hole before blasting.
Screens—Boxes or inclined spouts with bars for separating small coal from large; n. *Screener.*
Scrin—A small vein.
Seam—A stratum or bed of coal or other mineral; in Cornwall, a horse load.
Sea-sale—Coals sent by shipping.
Seat—The floor of a mine.
Seg—A bend down in the middle.
Set—To fill a tub unfairly by leaving the middle hollow; also, the mouldering of coal or stone before falling.
Set-off—The part of a connecting-rod to which the bucket-rod is attached.
Sett—A grant of mining ground; also, a frame for supporting excavations.
Setters—The large coals placed by cartmen at the sides of a cart.
Settle boards—The platform at the top of a pit.
Shadd—Smooth round stones on the surface containing tin ore, and indicating a vein.
Shaft—A pit sunk from the surface; also, the handle of an implement.
Shaft-walls—Pillars of coal left near the bottom of a pit.
Shake—A cavern, usually in limestone.
Shaking—Washing the ores.
Shammel—The lifting of ore or water by different persons or machines at successive heights.
Shear legs—A wooden framing.
Shears—Two long pieces of wood placed vertically over a shaft, and united at the top, for lifting or lowering materials of great length.
Sheaths—The upright framing of a waggon.
Sheave—A wheel or roller; a pulley.
Shelf—The solid rock.
Shet—The roof of a coal mine when broken down.
Sheth—Rib of a chaldron waggon.
Sheth door—A door for ventilating back workings.
Sheth of boards—A district of workings.
Shething—See *Coursing.*
Shift—The time for a miner's work in one day.

Shifter—A man who prepares the working places.
Shiver—Shale, a hard argillaceous bed.
Shoad ore—Ore washed or detached from the vein naturally, rough and not carried far.
Shoding—The tracking of boulders towards the vein or rock from which they have come.
Shooting—Blasting.
Shorts or *Short-workings*—The quantity of coal or mineral deficient for making up a certain rent.
Shot—A blast.
Show—The pale blue lambent flame on the top of a common candle flame, indicating fire damp.
Siddle—The inclination of a seam of coal.
Side-basset—A transverse direction to the line of dip in strata.
Side-laning—Making a main passage of a coal mine part of a new side of work.
Side of work—An aggregate number of excavations and pillars in the ten yard coal in Staffordshire.
Side-wavers—The loose sides of a drift or open works.
Sill—A stratum; also, a piece of wood laid across a drift.
Sinking—Working downwards; n. *Sinker*.
Skimpings—Skimmings of the light ores in dressing.
Skip or *Skep*—A square tub or iron box for drawing coals to the surface.
Slack—Small coals.
Slag—The vitreous mass covering the fused metals in smelting; also, see *Brat*.
Sled—A sledge.
Sleek—Mud brought by water.
Slide—A vein of clay intersecting and dislocating a vein vertically; also, an upright rail fixed in a shaft with corresponding grooves for steadying the cages.
Sliders—Wood for keeping shafts and drifts open.
Slimes—Mud containing ores.
Sline—Natural transverse cleavage of rock.
Slip—A dislocation, as to a vein. See *Throw*.
Slipes—Flat iron plates for corves to slide on. See *Corf*.
Slit—A communication between two levels.
Sliver—A thin lath within two groves for making a joint air-tight.
Slot—A bolt or fastening.
Small coal—Coals passed through a screen or grate.
Smart money—Weekly sums paid by owners to persons injured in working.
Smelting—Reducing the ores in furnaces to metals.
Smitham or *Smiddam*—Lead ore dust.
Smut—Decomposed coal or black dust.
Snatch—A small chimney used for ventilating small works.
Snoff—The match for lighting the train in blasting.
Snore holes—The windbore holes for water.
Soards—The agitation of the bellows in smelting (*Pettus*).
Sole—The floor of a mine; also, the bottom framing of a waggon.
Sole-tree—A piece of wood belonging to the stowces for drawing water up. See *Stowces*.
Sollar—A small platform at the end of a series of ladders.

Sough—A level for unwatering a mine.
Spalling—The breaking of the ores in the rock, for easier separation, previous to cobbing. See *Cob.*
Span beam—The horizontal beam passing over the whim in which the upper pivot of the vertical axis moves.
Spanner—An implement for turning screws.
Spar—Minerals, chiefly non-metallic, and more or less crystalline.
Spare—A piece of wood used as a wedge in cribbing or tubbing.
Spears—Pumping rods.
Spend—To break ground; to work away.
Spigot and faucit—A kind of pump joint.
Spindle—Part of the stowces. See *Stowces.*
Spire—See *Reed.*
Splint—Coarse grey coal.
Spout—A channel communicating from the air head to the gate-road in the ten yard coal; also, a box for sliding coals into a ship.
Spurns—Small supports left for safety in the operation of cutting the coal. See *Cutting.*
Squat of ore—See *Bunch.*
Stage—A distance travelled by horse underground, marked by lights.
Staith—An erection of wood for shipping coal; and *Staithman.*
Stalch—Wood or mineral left for support.
Stall—An opening between coal pillars in the direction of the work and the transverse openings.
Stamp—A mark on the roof or side of a mine for showing the amount of work done; also, a hole made in coal for a wedge.
Stamp-head—The iron weight connected with the stamps. See *Stamps.*
Stamper—A boring implement.
Stamps or *Stampers*—Machine for crushing the ores.
Stamps grate—See *Grate.*
Standage—Space for standing water.
Standard—The price of fine copper (Cornwall).
Stannaries—See *Index.*
Staple—A small pit.
Start—The lever of a gin.
Stays—Supports; also, piece of wood for securing the pumps in the engine shafts.
Stea—A ladder.
Stem—A day's work; also, to fill a hole with coal or stone before blasting.
Stemmer or *Stemming-hammer*—A piece of iron for putting clay into blast holes.
Stemples—Wooden steps in a mine.
Stence—Wood for supporting a roof.
Stenton or *Stenting*—A passage between two main headways.
Stickings—Thin veins of ore, or thin seams of clay in veins.
Stint—A certain quantity of work to be done.
Stone head The rock below the alluvium.
Stook—A small block of coal left to support a headway's course.
Stooled—Applied to a vein cut vertically for some distance.

Stope—A horizontal bed; to work horizontally; also, mineral ground to be worked; also, the work at the sole of a drift; also, a hole or step for a stemple.
Stoping—Working downwards.
Stopping—A barrier of bricks or clay for turning the course of the air.
Stowces—See *Index*.
Stowing—Rubbish for filling up old works; and *Stow-board*.
Straight stall—An excavation into the thick coal.
Strake—An open box of wood in which the ores are washed.
Strapping plates—The iron plates of the connecting-rods.
Stream tin—Tin ore in the form of pebbles on the surface.
Streamers—The searchers for stream tin. See *Index*.
Streek—A flat or dilated vein between two strata.
String—A small vein.
Strum—A cover for the end of a waterpipe.
Stuff—Refuse.
Stull—Timber placed in the backs of levels for supporting refuse. See *Back*.
Sturt—The excessive wages of a tributer on cutting a course of ore.
Styth—See *Choke damp*.
Sump—A pit sunk within the mine; also, the bottom of an engine shaft; also, a catching drain; also, the part of a judd of coal first brought down. See *Judd*.
Sump-men—The assistants of Cornish pitmen. See *Pitman*.
Sump-shaft—The engine shaft.
Sun-cheek or *Sun-vein*—The south side or vein.
Swad—A thin bed of coal or stone below a coal seam.
Swallows or *Swallow-holes*—Natural holes on the surface caused by subsidence of rocks; also, caverns or openings where the water disappears.
Sweep—Applied to a vein branching like the segment of a circle.
Sweep-plates—Curved plates for barrow ways at a turn.
Tack—A small prop of coal.
Tackle—Windlass, rope and bucket (Cornwall).
Tacklers—Small chains round the loaded corves. See *Corf*.
Tail-crab—A capstan for winding the spare rope
Tamping—The soft material placed on the gunpowder for confining its force in blasting.
Team—To load water in bowls.
Tear war—A signal for ascent from a pit.
Tee—Applied to a cross vein meeting a main vein without intersecting it.
Ten—A measure varying from 418 to 440 bolls (Winchester).
Tentale rents—The rents per ten.
Terluing—See *Dileuing*.
Thill—The floor of a coal mine.
Three-trees—A kind of ladder.
Throw—Applied to a vein nearly vertical, and of regular hade.
Throwing—Breaking out the supports for the hanging coal after cutting. See *Cutting*.
Throw up or down—Applied to an intersected vein.

Thurl or *Thyrl*—A long coal level; also, to make a breach into old works.
Thurst—See *Creep*.
Ticketings—The sales of ores.
Tie—A level; also, a support for the roof in coal mines, attached to the rib. See *Tee*.
Timber-man—The man employed in supporting the excavations.
Tipe—To upset a waggon.
Toadstone—Basaltic rock.
Tollar—The person who examines the limits of tin ore ground periodically.
Token—Marked leather sent up by heavers of coal.
Tomahawk—An implement used in sinking.
Topit—A boring tool.
Tossing or *Tozing*—The process of suspending ores by agitation in water previously to packing. See *Packing*.
Towt—Old rope.
Trade—Refuse.
Tram—A carriage for the tubs.
Tram-road—Railroad.
Trapper—A boy who attends to the air courses.
Treloobing—See *Tossing*.
Tribute—The portion of the ore given to the miner for his labour or its value.
Tribute pitches—The limits assigned to a party of miners.
Tributers—The miners working for tribute.
Trimmer—A man who spreads coals in the ship's hold.
Trogues—Wooden drains, like troughs.
Trouble—A dislocation of the strata.
Trow—A wooden channel for ventilation or water.
Trumpeting—A small channel cut behind the brickwork of a shaft.
Trunk—The cistern or inclined box used in separating the ore and slime; also, wooden spouts for air or water; also, boxes for raising rubbish to the surface.
Trunking—The process of separating the ore and slime before racking and tossing.
Tubbing—Iron cylinders in a shaft for keeping out the water, and causing its rise to a height.
Tubs—Boxes for conveying coal.
Tuft—A soft sandstone; also calcareous deposits.
Tugs—Hoops of iron on the corves for the tacklers. See *Tacklers*.
Tummals—A heap.
Tunnel head—The top of a furnace.
Turn—See *Sump*.
Turning house—The first working on a vein after it is cut transversely.
Turn out—A short loop line of railway for the passing of waggons.
Turn-tree—A part of the drawing stowce. See *Stowce*.
Tut work—Piece work; paid per fathom.
Tuyere—The aperture for admitting air into a furnace.
Twitch—See *Check*.
Tying—Washing.
Underlay—Applied to an inclined vein.
Underlayer—A vertical shaft.

Underlay shaft—A shaft sunk on the course of a vein.
Under-level drift—A drift from a pumping pit, to free dip workings from water.
Under the top—Applied to the coal left arched in bad roofs.
Upcast—Applied to a dyke, where the coal is uppermost; also, to a pit where the air ascends.
Van—to cleanse ore on a shovel.
Vein—See *Index*.
Veinstone—See *Rider*.
Vend—The whole produce of a coal mine.
Vestry—Refuse.
Viewer—A manager of a colliery.
Vugg or *Vogle*—A cavity.
Waggon hole—The place where the railway ends in a side of work.
Waling—Cleaning coals by picking out refuse.
Wall—The side of a level or drift; also, a passage underground between boards. See *Boards*.
Walling—Applied to the roads in a mine, when made with stone.
Wash hole—A place for refuse.
Waste—A vacant place in the gobbing. See *Gobbing*; also, old workings.
Waste-man—A man charged with the ventilation.
Water blast—A kind of ventilation effected by diverting a stream of water down a shaft.
Waving—Applied to a vein opening and closing at short intervals.
Way-end—The place where the road enters the face of ironstone mines.
Way-leave—See *Index*.
Weigh board—Clay intersecting a vein.
Well—The lower part of a furnace where the metal falls.
Wharr or *Wharl*—A slide for carrying corves in low drifts.
Whim or *Whimsey*—A machine for raising ores and refuse.
Whimble or *Wimble*—A hollow instrument for cleaning a hole in boring.
Whip and Derry—A bucket drawn to the surface by a horse.
Whole—Unworked mineral.
Willd lead—Blende.
Winch or *Winze*—Windlass.
Windbore—The lowest pump with holes for water.
Wind-holes—Shafts or sumps for air.
Winding engine—An engine for raising minerals and refuse.
Windway—An air course.
Winze—A sump or pit sunk to a vein for communicating one level with another.
Work—Undressed ores.
Working big—Large enough for a man to work in.
Workings—The excavations.
Wough—Wall of a mine (*Pettus*).
Yokings—See *Stowces*.
Zawn—A cavern.
Zighyr—Applied to water slowly issuing through a crevice.

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